COMPLETED 161 Y4.J89/1:99/47

CONDUCT OF HARRY E. CLAIBORNE, U.S. DISTRICT JUDGE, DISTRICT OF NEVADA

ORIGINAL

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

SECOND SESSION

ON

H. Res. 461

CONDUCT OF HARRY E. CLAIBORNE, U.S. DISTRICT JUDGE, DISTRICT OF NEVADA

JUNE 19, 1986

Serial No. 47

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

61-466 O WASHINGTON : 1986

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CONDUCT OF HARRY E. CLAIBORNE, UNITED STATES DISTRICT JUDGE, DISTRICT OF NEVADA

THURSDAY, JUNE 19, 1986

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

[On June 24, 1986, during subcommittee consideration of H. Res. 461—(to impeach Harry E. Claiborne of high crimes and misdemeanors) a motion was offered by Congressman Moorhead to release the following testimony and evidence received during the executive session. The motion passed unanimously.]

The subcommittee met, pursuant to notice, at 9 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Brooks, Mazzoli, Synar, Schroeder, Frank, Morrison, Moorhead, DeWine, Kindness, and Coble.

Also present: Representatives Hughes, Fish, Sensenbrenner, and Gekas.

Subcommittee staff present: Michael J. Remington, chief counsel; Gail Higgins Fogarty, David W. Beier, Deborah Leavy, counsels; Richard Cates, special counsel; Thomas E. Mooney and Joseph V. Wolfe, associate counsels; Michael Kemp, intern; and Audrey Marcus, clerk.

Also present: M. Elaine Mielke, general counsel; Garner J. Cline, staff director; Daniel Freeman, parliamentarian; Judith Bailey and Gary Goldberger, counsels; Alan F. Coffey and Alan Slobodin, associate counsels.

Mr. KASTENMEIER. The committee will come to order.

Pursuant to notice, I will call the subcommittee to order for the purpose of conducting an investigatory hearing relating to House Resolution 461, a resolution calling for the impeachment of Harry E. Claiborne.

Based on 200 years of American history, and then preceding that, with 400 years of English experience, there has never been issues such as those confronting the subcommittee this morning.

Each impeachment process is in a sense unique. This is the first time in our history that a convicted Federal judge has been the subject of an impeachment inquiry. Specifically, we are looking into the fact that the U.S. District Judge, Harry E. Claiborne, who swore under oath to support the laws and Constitution of this

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Nation, was found guilty by a jury of having filed tax returns which he knew not to be true, knowing he had received substantially more income than he was reporting and, therefore, was convicted by a U.S. district court, fined $10,000, and sentenced to two 2-year terms to be served concurrently.

Shortly the subcommittee will go into executive session, as was the practice of the Judiciary Committee 12 years ago during the Watergate impeachment inquiry. Now I would like to give you a very brief explanation of the chain of events that causes us to be here this morning.

In August 1984, Judge Harry E. Claiborne, a district judge from the State of Nevada, was convicted during a second trial of willfully failing to report approximately $106,000 in legal fees he had previously earned as a defense attorney.

On April 21, 1986, the Supreme Court of the United States, without comment, refused to hear Judge Claiborne's final direct appeal in an attempt to overturn his conviction.

On May 16, last month, Judge Claiborne reported to a Federal penitentiary located in the State of Alabama. He continues to receive his annual salary of $78,700, since the Constitution provides that the salary of a Federal judge cannot be reduced while in office.

On June 3, 1986, House Resolution 461 was introduced by the chairman of this committee, Mr. Rodino, by several other members of this committee, and by myself, calling for the impeachment of Judge Claiborne. House Resolution 461 was referred to this subcommittee, and we must decide whether to process it or not, and if we do process it, how to amend it with specific articles of impeachment.

The proposal to impeach Judge Claiborne is rooted in two core constitutional clauses: Article III, Section 1, provides, and I quote, that "Judges both of the Supreme and inferior Courts shall hold their Offices during good Behaviour." Article II, section 4, states that "all Civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors."

The plain meaning of these constitutional provisions, and several others, is that Federal judges must maintain the highest standards of conduct to preserve the independence of and respect for the judicial system. The American judicial system, perhaps the greatest in the world, nonetheless is a fragile and vulnerable vessel.

Perhaps the conviction of a Federal judge should not surprise us. Benjamin Cardozo once observed "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."

And so we find ourselves here this morning with a resolution to impeach Judge Claiborne before us. We may, I regret to say, see similar resolutions in the near future because we have at least one other Federal judge who has been convicted of a felony.

When a judge engages in criminal activities or conduct that casts doubts upon his personal integrity, he or she raises questions that impact citizen respect and confidence in the judicial branch of government. Our courts are only as strong and resilient as the citizenry's respect for them.

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The fact that Judge Claiborne had been found guilty by a jury of his peers on two criminal offenses, coupled with the fact he has refused to resign from his office, creates a prima facie case for the commencement of this impeachment inquiry.

At this point I would like to inform the press and public that I intend to limit the inquiry to the conduct of Judge Claiborne. As we previously wrote witnesses, our inquiry will be restricted to an examination of the two counts of making and filing false statements in Judge Claiborne's tax returns for the 2 years, 1979 and 1980, for which he was convicted.

The inquiry will also assess whether Judge Claiborne's conviction and incarceration constitute behavior incompatible with the duties and responsibilities of a Federal judicial officer. We have prepared materials in connection with these matters, and thus we shall now proceed.

I would like to recognize the gentleman from Kentucky for a unanimous-consent request.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. Chairman, I ask unanimous consent the committee permit the meeting this morning to be covered in whole or in part by television broadcast, radio broadcast, and/or still photography pursuant to rule 5 of the committee rules.

Mr. KASTENMEIER. Without objection, so ordered.

Now, I would like to yield to the gentleman from New York, Mr. Fish.

Mr. FISH. Thank you very much, Mr. Chairman.

Today we formally begin consideration as to whether or not Judge Harry E. Claiborne of Nevada should be impeached. In 1974, in my view, our committee demonstrated an ability to conduct such an inquiry in a fair, thorough, and bipartisan manner, and I have every confidence this will be true again.

Impeachment is a unique prerogative of the legislative branch. It is a constitutional, rather than a legislative responsibility, and a responsibility that cannot be shared by the House of Representatives with any other branch of the government. A decision to impeach clearly does not necessitate a prior criminal conviction.

Having said that, it is also axiomatic that criminal conduct is a justifiable basis for an impeachment. Unlike all previous impeachments, what we have here is the fact of a prior criminal conviction. That is, a properly impaneled jury listened to the facts, evaluated those facts, and reached unanimous verdict as to those facts testified to and conviction beyond a reasonable doubt.

Given this graphic situation, the House of Representatives, and specifically the Committee on the Judiciary, have an obvious duty and responsibility to undertake this inquiry. An overriding concern in these deliberations is public confidence in the integrity of the judicial branch and the individual Federal judges that exercise the most important responsibilities of that branch under our constitutional system.

The current situation regarding Judge Claiborne raises fundamental questions about public confidence in and the public's perception of the Federal court system. At the same time, Mr. Chairman, this committee and the House of Representatives will be judged by the American people on the conduct of our responsibil-

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ities, and, therefore, our inquiry must be fair and thorough and have a firm, legal, and moral basis.

I am not here to prejudge the case, but the fact of conviction does demand that this committee and this House immediately inquire into this matter. I intend to work closely with you, Mr. Chairman, and other members of this committee in an effort to bring about a prompt and fair resolution.

Mr. KASTENMEIER. The gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. Thank you, Mr. Chairman.

What we are about here this morning is a constitutional process that is older than our republic, that finds its origin in English history. The term "impeachment" was lifted from English law. Impeachment, itself, was conceived because England's objects of impeachment for one reason or another were beyond reach of an ordinary criminal process. When our Founding Fathers adopted this English idea to the American scene, they replaced an unimpeachable king and his council with an impeachable president and civil officer. They separated impeachment from subsequent criminal prosecution so that a person impeached could no longer be put to death, as in England, and they withheld from the President power to pardon the impeached officer.

One thing is clear in our system of Government, and it was made clear right here in this room in 1974, no executive, no judicial or no legislative person by reason of his or her elevated station is above the reach of the law.

Article II, section 4, states the President, Vice President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Article III, section 1, states, "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior."

The Constitution is unclear as to the precise meaning of good behavior. What we do know is that the good behavior standard, coupled with impeachment, was intended by the framers of the Constitution to protect the independence of the judiciary and to isolate it from political or any improper influence. The degree of independence enjoyed by the members of the judiciary is unmatched in any other public office, and in the majority of cases has resulted in life tenure for Federal judges.

However, I think it is important to recognize that inherent in the independence granted to Federal judges by the Constitution, there is the potential for abuse. The strong public consensus among Members of Congress and the general public in the sensitive area with which we are dealing here today is that the vast majority of Federal judges are competent and honest. There are relatively few instances of a Federal judge failing to conform to the constitutional standard of good behavior.

However, when corruption or other misbehavior occurs, the Federal judge must be held accountable. There is no question that impeachment is a cumbersome and unwieldy process, as evidenced by the fact that in over 200 years only 54 Federal judges have been

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investigated, and of these, only eight judges and one justice have been impeached. Furthermore, only four judges have been removed, with the last impeachment of a Federal judge occurring over 50 years ago.

The structuring of impeachment as a difficult process was, I believe, intentional. For by so doing, the Founding Fathers provided protection for the independence of Federal judges who in many cases render unpopular decisions.

In conclusion, Mr. Chairman, I think it is important to point out that the most important possession of our judiciary is its respect and integrity. If the people of our country lose respect for our judiciary, if the people of our country feel that they cannot obtain justice in our courts, then there is a very serious crack in the foundation of our Republic. Men and women who sit in judgment of their fellow man must be above moral or legal reproach.

I would like to assure the people in this room today that we intend to be thorough, we intend to be fair and decent, and we intend to move as swiftly as justice permits.

Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. I thank the gentleman. The gentleman from Kentucky.

Mr. MAZZOLI. Thank you very much, Mr. Chairman.

Just very briefly, I want to commend you for your very clear and concise and excellent statement of today. You laid down the general outline of the case and of the background in which we will handle this inquiry, and I think you also did one very valuable thing on page 4 of your statement, indicating the inquiry would be restricted and would be a limited inquiry. This is not, as I understand it, to retry the case, it is not to examine the minutia of the evidence, it isn't to examine the jot and tittle of everything that has been done in all these years.

But it is to examine the two things the gentleman from Wisconsin, our distinguished chairman, has indicated, the examination of the two counts of making and filing false statements in Judge Claiborne's tax returns for 1979 and 1980, and that inquiry will assess whether the judge's conviction and incarceration constitute behavior incompatible with the duties of a Federal officer.

While no one here is prejudging the case, it is clear that the judge has been indicted, convicted, sentenced, he is currently serving a term in the penitentiary, and the question we have is whether or not that is incompatible with the duties and responsibilities of a Federal judicial officer in the scope of those two charges.

I want to salute the gentleman and to thank him for his leadership to this point and to assure him that all of us will be paying clear attention as the case is unfolded.

Mr. KASTENMEIER. The gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. I move pursuant to rule 11, clause 285, that the committee go into executive session to receive testimony for today and tomorrow.

Mr. KASTENMEIER. The motion is not debatable. The question is on agreeing to the motion. All in favor of the motion, please say "aye".

[Ayes.]

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Mr. KASTENMEIER. Opposed, "nay".

The "ayes" have it, and the motion is agreed to. Accordingly, the room will be cleared of all persons except committee members and designated staff. I understand that this will take perhaps some 15 minutes or so.

Witnesses will find, I suspect, quarters on the side, either side of the committee room, to wait to be called for testimony.

Accordingly, the committee is closed and will resume hearing in executive session.

[Whereupon, at 9:27 a.m., the subcommittee was recessed and proceeded into executive session.]

EXECUTIVE SESSION

[Subcommittee and GPO staff have made necessary grammatical, spelling, and technical corrections to the official transcript. A copy of the original transcript is on file with the subcommittee.]

The subcommittee met, pursuant to call, at 9:35 a.m., in room 2141, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Brooks, Mazzoli, Synar, Schroeder, Frank, Morrison, Moorhead, Hyde, DeWine, Kindness, and Coble.

Also present: Representatives Hughes, Fish, Sensenbrenner, and Gekas.

Subcommittee staff present: Michael J. Remington, chief counsel; Gail Higgins Fogarty; David W. Beier; Deborah Leavy, counsels; Richard Cates, special counsel; Thomas E. Mooney and Joseph V. Wolfe, associate counsels; Michael Kemp, intern; and Audrey Marcus, clerk.

Also present: M. Elaine Mielke, general counsel; Garner J. Cline, staff director; Daniel Freeman, parliamentarian, Judith Bailey and Gary Goldberger, counsels; Alan F. Coffey and Alan Slobodin, associate counsels.

Mr. KASTENMEIER. The committee will come to order.

The committee is in executive session. I would caution members and other persons who are permitted to sit in on this subcommittee's executive session that the House rules specifically provide "no evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee."

Furthermore, I will state to members that we will be proceeding following presentation of the witnesses in executive session under the 5-minute rule. As Chair I intend to yield at the outset any time I would have to our special counsel, Richard Cates. I would hope that his questioning could help focus the inquiry and I would hope, as I pointed out before, members would be aware of the scope of the inquiry in connection with questions.

May I say this about witnesses and those present in the room. The first witness will be Mr. Hendricks of the Justice Department. He is accompanied by Ms. Jan Neilson Little. I am not sure if Ms. Little herself will be testifying. I take it not, but she is very familiar with the case we are informed.

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Mr. MOORHEAD. Mr. Chairman, I feel it is fine from the minority side if Mr. Cates has 5 minutes or 10 minutes if he needs it to start, but we think you should be allowed to have your 5 minutes.

Mr. KASTENMEIER. I thank the gentleman. I think that is guidance then for special counsel.

I am informed the Justice Department presentation may be 2 or 3 hours. It may be an extended period of time, I am not certain about that. Our second witness will be the Honorable Charles Wiggins, a circuit court judge, formerly a member of this committee. His presentation will be less lengthy.

The third witness will presumably be, depending on whether counsel Goodman desires to have him present testimony, Judge Harry Claiborne himself.

Now, it will be noted that the counsel for the respondent Judge Claiborne, Mr. Goodman, is present, along with co-counsel, former Senator Cannon. And that they will be present during the proceedings. We consider this essential if we in fact expect the respondent to respond in any informed manner. At least they must be present to the extent they care to be during the presentation of the prior evidence, it is assumed. I say this for the guidance of members, that Judge Claiborne will be present in this room perhaps in the next hour or so. He is on route we are informed.

That being the case, we will commence the proceedings. I will call Mr. Hendricks forward, and if he would come forward and take the oath.

Mr. Hendricks, the rules of the House and the rules of the committee are at the witness table.

[Witness sworn.]

Mr. KASTENMEIER. Please be seated.

Mr. Hendricks, is it possible that your colleague, Ms. Little, may respond in whole or in part to any question or say anything audibly in these proceedings?

Mr. HENDRICKS. It is possible, Mr. Chairman.

Mr. KASTENMEIER. In which case, I would then take this opportunity to swear Ms. Little in under the same process.

[Witness sworn.]

Mr. KASTENMEIER. Mr. Hendricks, you may proceed, sir.

TESTIMONY OF WILLIAM C. HENDRICKS III, ESQ., DEPUTY CHIEF, PUBLIC INTEGRITY SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY JAN NIELSON LITTLE

Mr. HENDRICKS. Thank you, sir.

As the Chair has noted, my name is William Hendricks, and I am here this morning at the request of the subcommittee. As the Chair knows, the Department of Justice has attempted to respond to the request of the subcommittee for documentation relating to Judge Harry E. Claiborne's prosecution and subsequent conviction. In a letter dated April 4 of this year, we formally offered our assistance, and we continue to stand prepared to do whatever we can to accommodate the subcommittee's request and those of the membership of the entire committee during the course of this inquiry.

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We recognize, of course, that this decision is that of the House as to whether Judge Claiborne should or should not be impeached. I am here solely for the purpose of providing you with whatever factual information I can in order to enable you to make informed recommendations in this regard.

I would therefore prefer to begin this morning with an overview of the case, a discussion of the evidence which led to the conviction of Judge Claiborne, and the facts which gave rise to that conviction, together with a brief description of the appellate record of the case, and then I would be happy to answer any questions that any of the members may have. But I would respectfully request that these questions focus on fact rather than on any opinions I may have relating to the case.

Mr. Chairman, the evidence in this case—first if I may—the convictions—there were two convictions, that is on two counts, one of them related to false statements made on Judge Claiborne's 1979 income tax returns, and the second count of which Judge Claiborne was convicted, related to false statements made in connection with his 1980 income tax returns.

If I may focus first on the 1979 income tax return. The evidence in the case, and all of the evidence I will refer to will relate to evidence in the case or other information obtained during the course of the Government's investigation. The evidence in the case was that Judge Claiborne moved to the Las Vegas, NV, area in the mid-1940's, and after a period of service in the Las Vegas area he opened a law firm in the late 1940's. He, at about the time he opened his law firm, employed an individual he had previously known by the name of J. Wright, W-r-i-g-h-t, as his accountant. Mr. Wright was a public accountant. Mr. Wright was highly qualified and Mr. Wright thereafter performed the services of an accountant for Mr. Claiborne, subsequently Judge Claiborne, for the next 30 years without any break.

During this period, the late 1940's and 1950's Judge Claiborne and Mr. Wright agreed upon themselves as to a form or a means by which Mr. Wright would maintain an accounting system for Judge Claiborne, and it was roughly as follows. All bank statements of Judge Claiborne were sent by the banks to Mr. Wright. Judge Claiborne would send the receipts, which copies of receipts he would provide to clients, along with other supportive information, such as check stubs and deposits, to Mr. Wright.

Mr. Wright then on a monthly basis would take the deposit slips and he would take the deposits provided to clients and he would reconcile the two and make determination, a check register listing all checks and expenses and develop a system for identifying legal fees received by Judge Claiborne.

These exhibits in the trial for purpose of your information were included exhibits 22 and Government's exhibit 23 during the course of the trial of the case.

The evidence in the case was that at the end of every year, for purposes of tax, that Mr. Wright would assemble the 12 monthly statements which he had prepared for Judge Claiborne and that those 12 monthly summaries would be used to produce one yearly summary, which would indicate, among other things, all of Judge Claiborne's legal fee income for the year.

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The evidence in the case would be that after that yearly summary was produced in a careful and considerate fashion, Mr. Wright would sit down with Judge Claiborne and go over the yearly summary for the purpose of assuring they had carefully and accurately identified all legal fee income.

Mr. KINDNESS. Mr. Chairman, call for order.

Mr. KASTENMEIER. The gentleman will state his order.

Mr. KINDNESS. Inasmuch as the information being provided, let us characterize the evidence to some degree. I would ask if you could differentiate that evidence that is stipulated, that is tested, so that we might be sure which is which.

Mr. Chairman, my request is that if the witness could differentiate between that part of the evidence described which is either uncontested or stipulated, and that which might have been contested in the trial, it would help in the evaluation of the summary.

Mr. KASTENMEIER. Is the witness able to do that which the gentleman from Ohio requests?

Mr. HENDRICKS. Yes, I am.

Mr. KASTENMEIER. In which case, without objection, we would request you do.

I thank the gentleman from Ohio's request.

Mr. HENDRICKS. I believe everything I have related to the committee so far is uncontested. I will indicate in the future, during the course of my testimony, any areas which I believe have been subject to contest by the defense.

The evidence in the case further demonstrated that on the basis of this process of accounting and review with Judge Claiborne, that Mr. Wright would prepare the 1040 tax returns every year, and this was the typical process that was used year in and year out, beginning in about 1948 or 1949, and continuing for 30 years after that.

For these services, and other services, including other tax purposes, Mr. Wright was paid for the relevant period of time here $500 per year.

Now, during the period also relevant to the case, there was also evidence, and I believe it is uncontested, that Judge Claiborne also maintained his own small black book which contained and recorded all of his legal fees. The exhibit was in fact a defense exhibit, and it is Defense Exhibit 47.

In particular, as it relates to the 1979 tax year, it is clear and uncontested, I believe, that Defense Exhibit 47 contains notifications as to all of Judge Claiborne's legal fee income for that year.

Now, if I could take the committee up to the 1970's. By the 1970's, Harry E. Claiborne had become a highly successful lawyer. His practice was general trial litigation, and he was involved in the defense of a number of significant and widely reported cases in the Las Vegas area, and other places.

In 1977, his gross income was $375,752, and his gross income for the first 8 months of 1978 was $240,876. Of course, his net income was something less than that, I believe approximately $190,000-some-odd in 1977, and an appropriately smaller amount for 1978.

In September 1978, Judge Claiborne became—was sworn in and became a U.S. district court judge for the district of Nevada. At that time, his salary dropped rather dramatically to approximately

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$54,000. And I believe, sir, there is no question regarding that. By Judge Claiborne's own words, that drop was—his income "dropped dramatically." That characterization is contained on page 929 of the transcript of the trial, and I believe that was Judge Claiborne's testimony.

At the same time that his income was dropping as a result of his taking on the judicial robes, many of his expenses—because of his lifestyle—remained constant. For example, his various alimony payments continued to remain constant at $21,000 per year, so that his effective disposable income had dropped even more significantly than the drop from $375,000 gross to $54,000 would indicate.

Again, I would point out that by Judge Claiborne's own admission, he became in a "financial bind," and this bind became worse as time went on.

By mid-1980, Judge Claiborne was in such a condition of financial bind that he wrote a letter to an attorney named Frank Rothman requesting an immediate payment of a $37,000 legal fee, and stated: "For the first time in my life, I am desperately in need of money." The letter which Judge Claiborne wrote to Mr. Rothman was Government's exhibit No. 10 at the trial.

If I might back up the time—again, to the time Judge Claiborne became judge, at the time he left his law practice, there were two other attorneys employed in his law office, and they were James J. Brown and Annette Quintana. At the time Judge Claiborne left his practice, he agreed with Mr. Brown and Ms. Quintana to split fees on cases which they had worked on prior to Judge Claiborne's leaving his laws practice, but cases where they would be anticipated billings subsequent to the time Judge Claiborne took the bench, and this agreement resulted in legal fees being received by Judge Claiborne during calendar year 1979, which payments, legal fees, were reportable on Judge Claiborne's 1979 tax return.

Government's exhibit 6 contains a number of those legal fee checks which were provided to Judge Claiborne by Mr. Brown; and Government's exhibit 9 in the trial contained legal fee checks provided to Judge Claiborne by Annette Quintana.

I would indicate to the committee that the manner in which that was done would be that Mr. Brown would collect the fees from the clients, he would deposit the fees in his account, and he would then write a check pursuant to the fee splitting arrangement to Judge Claiborne, so that during calendar year 1979 Judge Claiborne received a number of fees from Mr. Brown, and similarly, Ms. Quintana did the same thing.

She would receive fees from clients. She would split the fees. And she would remit to Judge Claiborne his portion of the fees. Those fees included checks on January 5, 1979 for $3,381; a check for $17,500 on the 19th of January; a check for $833 on the 26th of January; a check for $84.38 on January 26; a check for $1,106.66 on February 15; a check for $7,000 on July 19; a check for $2,905.90 on August 31, 1979; a check for $3,011.56 on November 13, 1979; and a check for $250 on November 13, 1979.

All of those checks—nine in total, I believe, Mr. Chairman—were received from James Brown.

In addition, on January 16, Judge Claiborne received a check from Annette Quintana for $1,000; and he received an additional

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$1,000 check from Annette Quintana on February 12, on March 9, on April 12, and on May 14, 1979, for a total legal fee income from these two sources of $41,072.93.

At the same time, in 1979, Judge Claiborne's system for reporting his financial dealings to Mr. Wright changed, and Judge Claiborne began forwarding less and less information to Mr. Wright; and I don't think that that has not been subject to any debate.

We also know from the trial that Judge Claiborne did another thing with respect to his legal fee income, and that is, by and large, with certain exceptions, he stopped this consistent practice he had had for 30 years of depositing his legal fee checks in banks. Instead, he began to cash these checks at various establishments in the Las Vegas area, including predominantly casinos.

In early 1980, J. Wright, the accountant, began to go through the process, the final process, of preparing Judge Claiborne's 1979 tax return, and he did this by sitting down with Judge Claiborne at some time between May 22 and June 15, 1980. With respect to this particular period, I believe there had been some testimony from the defense, which was contrary to the Government's evidence, including the testimony of Mr. Wright, that they sat down between May 22 and June 15, 1980, and that Harry E. Claiborne and J. Wright agreed that Judge Claiborne's legal fee income for 1979 was $22,322.90.

Judge Claiborne listed—thereafter provided Mr. Wright with a number of sheets of paper which identified these items of income: $22,322.98—not the correct figure of $41,072.93. And these sheets on which Judge Claiborne indicated the $22,000 figure was Government's exhibit 31 during the course of the trial.

Now, the $22,000, the $22,332 figure was the only legal income for 1979 ever reported to Mr. Wright, according to Mr. Wright's testimony.

Judge Claiborne signed that return on the 16th of June 1980, and that return, which was Government's exhibit 3, reported $22,332.87. As I have mentioned, Judge Claiborne's true legal income was $41,072.93. The discrepancy between the $41,000 figure and the $22,000, which Judge Claiborne reported, resulted from facts which were demonstrated or shown on Government's exhibit 42, and I have, for the committee's benefit, made copies of Government's exhibit 42, which is a chart. If I may, Mr. Chairman, I might offer these copies, which rather graphically demonstrate how that income was handled.

Mr. KASTENMEIER. The witnesses' request is to do what?

Mr. HENDRICKS. I would like to provide to the committee copies of this exhibit for purposes of brief discussion.

Mr. KASTENMEIER. Without objection, the committee will receive copies of the exhibit.

[See appendix II.]

Mr. COBLE. May I ask a question? I didn't hear the last few words.

Mr. KASTENMEIER. Would you repeat your statement?

Mr. COBLE. When you say it graphically represents—I didn't hear the rest of that.

Mr. HENDRICKS. It is a chart in which we have identified all of these checks I have just mentioned, and it demonstrates how they

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were disposed of, whether they were reported or unreported, and whether they were deposited or cashed.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. KASTENMEIER. You may continue, Mr. Hendricks.

Mr. HENDRICKS. Now, this chart is a reduction of a much larger chart, which was about 3 by 6 feet in dimension, which we used during the course of the trial, and it is a reproduction of a Government's exhibit, Government's exhibit No. 42.

The points that I would like to make with respect to the use of the chart are that, of the 14 legal fee checks for 1979, out of 14 checks, as you can see by looking down the right-hand column, only 2½ of those checks were reported—2½ out of 14. The one-half, I might explain.

There is a $17,500 check on January 19 provided to Judge Claiborne by Mr. Brown, and one—a little more than one-half of that, $10,000, was reported. The remainder of that check, $7,500, was not reported.

So the point is, out of 14 checks, only 2½ were reported. There were 11½ checks that Judge Claiborne never told J. Wright about.

Of the 11½ checks that were not reported, 8 of those were cashed at casinos. This cashing of checks at casinos took place even though there was testimony in the case Judge Claiborne had to go farther from his office to cash checks at casinos than he would have had to have gone to have deposited them in his bank. He had to go past the bank to get to the casino to cash those checks.

This cashing took place even though Judge Claiborne had a practice, as testified to by Mr. Wright, of consistently depositing all of his legal fee income, for 30 years; and this cashing took place at a time when Judge Claiborne was becoming increasingly desperate for money.

There was testimony adduced from a Government witness on cross-examination that, from a Government expert, that a jury could reasonably infer that this pattern of cashing was associated with a desire to conceal income.

If I might pass on to tax year 1980——

Mr. KASTENMEIER. Counseling with my colleagues, since you just completed a phase and we have a recorded vote, it probably makes sense for us at this point to recess for 15 minutes.

If my colleagues agree, we will proceed in that fashion. The committee will stand in recess until about 10:15.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

We will proceed with Mr. Hendricks. You might just, for the purpose of responding to the fact we were in recess, indicate what area you have covered, and which area you now intend to go into, sort of recap that.

Mr. HENDRICKS. Thank you, Mr. Chairman.

I have covered up to this time the 1979, and the evidence in the case regarding the 1979 calendar year, and the actions that were taken to file Judge Claiborne's form 1040 income tax returns for 1979.

Now, I contemplate providing an outline of the evidence as it relates to the 1980 year. Now, the 1980 year was the second count of

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which Judge Claiborne was convicted during the trial in 1984, and it was count 6 in the indictment.

The evidence in the case, Mr. Chairman and members, is that during 1980, Jay Wright, the accountant, received little or no information from Judge Claiborne regarding his 1980 income. In late March or early April 1981, Jay Wright had not been dismissed as the accountant for Judge Claiborne, and even though he nad received no monthly information from Judge Claiborne, he nevertheless still considered himself to be Judge Claiborne's accountant, and he began the process of getting or trying to accumulate information for purposes of filing Judge Claiborne's 1980 tax returns.

He made numerous calls to Judge Claiborne for purposes of obtaining this information. The evidence is clear, and that is contained at pages 204 to 206, and 644 to 645 of the transcript that Judge Claiborne did not take his phone calls.

Jay Wright left messages for the judge to return his phone calls so that he could prepare the tax returns. These phone calls were not returned, and I don't believe this is testimony.

Information regarding this is contained at the same page numbers I have just cited.

Thereafter, without any discussion with his accountant, associat ed for some 30 years, Judge Claiborne decided to seek the advice of another tax preparer.

He essentially dropped Jay Wright without a word after 30 years of association. Judge Claiborne turned to a firm called Creative Tax Planning.

Creative Tax Planning was run by an individual named Jerry Watson. Mr. Watson had no college degree, no professional license, was not an accountant. In fact, he had been fired by an insurance company for ethical problems which he had during his employ.

This information is contained at the transcript, page 788 and following. Judge Claiborne hired Mr. Watson of Creative Tax Planning as his tax preparer without any inquiry into Mr. Watson's background or qualification.

Judge Claiborne has admitted that, and I would refer the committee to pages 961 through 970 of the transcript of the trial.

By April 6, 1981, Judge Claiborne and Mr. Watson had had discussions regarding the 1981 return. In a letter dated April 6, Mr. Watson says to Judge Claiborne, "The possibility of taking a loss on your business looks good."

This is contained in Government's exhibit 47.

The business that Mr. Watson is referring to is Judge Claiborne's law business which he had left in 1978, and that law business had been entirely written off on Judge Claiborne's 1978 tax returns.

Judge Claiborne knew this, and Judge Claiborne admitted this on cross-examination during the trial, pages 923, 924.

The testimony of the Government's witness, summary expert, at pages 798 and 807, makes it clear that the leasehold interests, the interests in furnishings, the interest in the law library had, for purposes of the depreciation schedules, been entirely written off as of the end of 1978.

Nevertheless, Mr. Watson, the individual I mentioned with no professional qualifications in this area, says to Judge Claiborne, "The possibility of taking a loss on your business looks good."

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On April 13, 1981, Judge Claiborne filled out and filed a request for extension of time in which to file his 1980 return, and he shows on that request, that extension request, which is Government's exhibit 4, that he has an estimated tax liability for 1980 of $42,847.96. That is what is in Judge Claiborne's mind when he signed that request for extension, during the course of his discussions with Mr. Watson.

On June 15, 1981, Mr. Watson completed Judge Claiborne's 1980 return. Judge Claiborne studied the return and discussed it with Mr. Watson, according to Mr. Watson's testimony—page 814 of the transcript—for 10 or 15 minutes.

That return is Government's exhibit 5. Judge Claiborne signed the return, and that return reports no legal fee income for 1980, when in fact his legal fee income for 1980 was $87,911.83.

Now, I should make some points which are beyond careful—beyond context, regarding the degree of sophistication that Judge Claiborne as a human being brought to that tax return at the moment he signed it.

First, Judge Claiborne, and this is without question, had reported legal fee income on his tax returns Schedule C income for 30 years.

Second, Judge Claiborne was a trial attorney with substantial criminal trial experience, and a person who had tried criminal tax cases.

Third, since 1978, Judge Claiborne had sat as a U.S. district judge in approximately 20 criminal tax trials, a number of which tax trials involved the same false statement issue, same issues regarding false statements, that are involved in this case, so Judge Claiborne has substantial experience and one would think a substantial sensitivity to the making of false statements on a tax return.

He also was a person who knew, by his own admission, transcript at page 923, how to handle capital transactions. He is a person who has stated that he clearly knew the difference between Schedule C income and capital gains income, page 923 of the transcript.

I said, in cross-examination in part at page 923, question: "You knew, did you not, Judge, the difference between regular income that you had always reported, Schedule C, and capital gains income?"

Answer: "I did."

Another point that should be made with respect to this is that Judge Claiborne, this is the year 1980, in which Judge Claiborne, by his own admission, was desperately in need for money.

Finally, this is the year in which he dismisses Mr. Wright without so much as a discussion, a man who had diligently prepared his tax returns for 30-some years, and proceeds to hire Mr. Watson without any inquiry and proceeds to pay Mr. Watson three times as much money as he had paid Mr. Wright for the services Mr. Wright had provided.

Mr. Watson produced Government's exhibit 5; that is, the income tax return for 1980. It reported no legal fee income. In fact, Judge Claiborne knew perfectly well, and I don't believe this is subject to any question, he knew that he had received substantial legal fees for the year 1980, and those legal fees were set forth in another

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chart which I would similarly offer for the benefit of the members, with the chairman's permission.

Mr. KASTENMEIER. Without objection, the committee will receive the charts as indicated. You will distribute them to the members.

[See appendix II.]

Mr. KASTENMEIER. You may proceed.

Mr. HENDRICKS. The chart I have distributed is a chart which shows a legal fee which Judge Claiborne received in 1980, and this chart was also Government's exhibit 43 at the trial.

It shows on December 31, 1979, an attorney, an associate person with whom Judge Claiborne had associated himself in connection with another legal matter, Peter Echeverria, wrote Judge Claiborne a $42,452.34 check, which Judge Claiborne received and deposited in January 1980, so this check was properly accounted as 1980 income.

On August 6, James Brown, associate of Judge Claiborne, wrote Judge Claiborne an $888.30 check, that on August 15, the law firm of Hochman, Salkin & DeRoy wrote Judge Claiborne a $37,500 check, and this check is the check which Judge Claiborne obtained after indicating he was desperately in need of money, and for the year 1980, November 7, James Brown wrote another check for $7,071.19 to Judge Claiborne.

Now, these checks, these three checks were deposited, three checks were deposited. The $37,500 check was cashed at a casino. None of this legal fee was reported on Schedule C or anyplace else in the report as legal fee income for 1980.

By way of observation, when looking at the chart, you will note that Judge Claiborne has gone back to the safer practice of depositing most of these large legal fee checks.

Now, this could be, and I submit this is an area with which Mr. Goodman and I might differ, but I submit that this could be attributable to the fact that Mr. Wright has now been eliminated from the scene, and since no accountant is receiving monthly statements, there is no particular need for Judge Claiborne to cash the large majority of his checks in order to avoid the reporting of them.

He is now free by 1980 to deposit any of the checks he sees fit to deposit. We have for 1980, instead of the $42,847.96 tax liability which Judge Claiborne had believed he would have when he submitted his request for extension of time to file his return, Judge Claiborne received back a refund from the Government for 1980 of $44,356.

That completes my presentation of the evidence, outline of the evidence in the case. I would be happy at this time to answer any questions.

Mr. KASTENMEIER. Thank you, Mr. Hendricks.

We will call on counsel. I would like to call on special counsel, and I would like to recognize him for 5 minutes of his own time and 5 minutes of my time—10 minutes—to ask any questions he may have.

Do I understand, Mr. Goodman, that you are asking for a recess?

Mr. GOODMAN. With the members' permission, I would request a 2- to 5-minute recess. I have been advised that my client, Judge Claiborne, has arrived; and I would like the opportunity to counsel

with him as to what has taken place so far and to invite him into these proceedings. I would like to be present, however, for all the questioning by Mr. Cates, and the other members of the subcommittee.

Mr. KASTENMEIER. Is it not possible for your associate counsel to inform the judge of what has happened so far?

Mr. GOODMAN. It certainly is possible.

Mr. MAZZOLI. Could we finish the round of questions? Would that disable the gentleman from counseling his client?

You limited us to the 5-minute rule.

Mr. KASTENMEIER. It may last about an hour, so that is what we are talking about here.

Mr. GOODMAN. Mr. Chairman, understanding the position, I would ask Senator Cannon whether he would be kind enough to speak with Judge Claiborne.

Mr. KASTENMEIER. I can understand your preference, but I think so long as there are two of you as counsel, that you could proceed in that manner without jeopardizing this matter.

Mr. GOODMAN. I appreciate that.

Mr. KASTENMEIER. Mr. Cates.

Mr. CATES. Mr. Hendricks, do you intend to speak about the processes, the procedure—are you going to tell us that part?

Mr. HENDRICKS. Yes, sir. I am sorry. I inadvertently overlooked that.

Briefly, if I might provide the committee with some information regarding the procedures, a chronology of the proceedings in this litigation, the indictments in this case were filed in 1983 on the 8th of December.

With respect to the tax counts, as is the usual practice of the IRS, a preindictment conference was provided, and trial counsel did not attend, but Judge Claiborne was afforded an opportunity to raise his views and express himself prior to any tax counts being brought in the case. So a preindictment conference was provided to him on the tax accounts. It was November 22, 1983.

On December 8, 1983, the indictment was filed and Judge Claiborne was arraigned on December 13, 1983.

On December 20, 1983, Judge Claiborne filed motions for a change of venue. Thereafter, on the 3d of January, he filed roughly 30 additional pretrial motions, which basically divided down into seven categories. Three of these thirty motions related to electronic surveillance, and six of the motions related to discovery, and three of the motions related to grand jury practice, and six of the motions related to alleged Government misconduct, and two of the motions were substantive motions to dismiss. One of the thirty motions related to evidentiary issues, and three of the motions related to procedural issues.

On the 3d, thereafter, the Government filed opposition on the 3d of January to the defendant's motion for a change of venue; and on the 9th of January, the Government filed its opposition to the 30 pertrial motions.

On January 9, 1984, there was a pretrial hearing held by Judge Hoffman, U.S. District Court judge, sitting by designation from the Eastern District of Virginia.

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There were hearings on all 31 pertrial motions. These hearings lasted for approximately 3 days and were evidentiray in nature.

On the 11th of January, 27 of those motions were disposed of by Judge Claiborne—excuse me, by Judge Hoffman. Seven of those motions involved deferrals of action. No action was taken at that time. One of those motions related to alleged grand jury abuse, and one related to electronic surveillance, and one related to grand jury minutes, a motion to discover grand jury minutes, and one of those motions related to plea bargaining, and another related to alleged IRS leaks, to alibis, and to a Government motion regarding the recusal of one of Judge Claiborne's counsel, one John Squire Drendel, who the Government believes was an anticipated witness in the case.

We had substantial pretrial litigation and disposal of the pretrial motions.

On January 20, 1984, the defendant filed an appeal, an interlocutory appeal, with the Ninth Circuit Court of Appeals regarding the constitutional issue of whether a judge may be tried before he is impeached by the House of Representatives. In regard to this litigation, interlocutory pretrial litigation, on February 10, 1984, a motion with the ninth circuit was filed to stay all proceedings in the U.S. district court; briefs were filed on the 13th, in the ninth circuit.

On the 14th, the stay was denied. On the 16th of February, the defendant, appellant, or petitioner, moved to renew the stays. On February 21, 1984, the stay was again denied.

On the 24th of February, oral argument took place in the ninth circuit; and on the 3d—or March 2, 1984, a third motion was made by the petitioner to stay the trial pending the resolution of this pretrial issue regarding the constitutionality of trying a Federal judge before he is impeached.

On the 5th of March, the ninth circuit entered an opinion affirming Judge Hoffman's position that a judge could be tried before he is impeached. That panel was three judges: Judge Kennedy from the sixth circuit; Judge Garth from the third circuit; and Judge Gibson from the eighth circuit.

On the 14th of March, there was a petition for mandamus filed in regard to this matter; and on the 19th, the petition for mandamus was denied by the ninth circuit. Thereafter, applications were filed with the U.S. Supreme Court.

On March 9, 1984, an application for a stay with the Supreme Court was filed. On the 12th of March, Justice Rehnquist denied the stay. On the 12th of March, Judge Claiborne's attorneys contacted Justice White. Justice White denied the stay on the 12th of March. Finally, on October 1, 1984, the Supreme Court denied cert on the interlocutory appeal.

Meanwhile, going back to early 1984, on the 9th of February, moving toward the trial date, there were three additional motions regarding procedural matters filed by the defendant.

On the 15th of February 1984, three more motions were filed by the defendant. And on the 17th of February, the Government filed its responses. And on the 17th of February, an order was entered by Judge Hoffman denying motions 27 and 30 of the previous—of the previously submitted motions regarding grand jury abuse and

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prosecutorial misconduct. And, in that order of the 17th of February 1984, Judge Hoffman, after reviewing the records in the case, characterized the prosecution, the prosecutor's activity as that of a model prosecutor.

I would recommend and commend to the committee's attention Judge Hoffman's order of the 17th of February 1984, which order we have provided to the committee.

February 21, 1984, there was a second pretrial hearing before Judge Hoffman, and the pending motions at that time were denied.

On the 29th of February of 1984, the defendant filed additional pretrail motions to dismiss count VII. On the 1st of March of 1984, the defendant filed two pretrial motions relating to a witness in the case.

On the 8th of March, the Government filed its responses. On the 12th of March 1984, the third pretrial hearing was afforded Judge Claiborne in this case, and it was a hearing on the motions to dismiss, relating to the use of FBI agents as agents who assisted the grand jury in connection with its operations.

On the 13th—excuse me, that was the 12th of March.

On the 13th of March 1984, the fourth pretrial hearing was held by Judge Hoffman, that time on the motion that the defendant had filed on the 29th of February to dismiss count VII. And, finally, on the 12th of March 1984, after four pretrial hearings, 40-odd pretrial motions by the defense, and an interlocutory appeal to the U.S. Supreme Court, the trial started—the 12th of March 1984.

On the 13th of April, approximately a month and a day later, a mistrial was declared by Judge Hoffman after the jury in the first trial failed to reach a decision on any of the counts then under consideration by the jury.

Judge Hoffman indicated that the trial would be held some time later in the year, a retrial.

On the 13th of April—excuse me, on the 23d of April 1984, the defendant filed a motion to recuse Judge Hoffman, and there were several supplements provided, attached to that motion.

On the 11th of June of 1984, an additional motion was filed by the defendant to proceed by way of unsequestered jury. The reason that was done is, Judge Hoffman had indicated after the mistrial that he intended to sequester the jury in the second trial because of some concerns the Judge had regarding the security of the jury.

On the 18th of June 1984, the judge offered an official order requesting sequestration of the second jury. On the 28th of June 1984, Judge Hoffman issued an order regarding the recusal motion which he denied, and which order of Judge Hoffman's is available for the committee.

On the 10th of July 1984, the Government dismissed certain of the counts in the indictment. Those counts were counts I, II, III and IV.

Excuse me. Should I abide by these lights?

Mr. KASTENMEIER. Let me just say that we are going to treat this explanation as part of your testimony rather than as a response to a question, because it might have been presented originally by you rather than in response to a question. It necessitates such a long response, the record is so long, that it should not militate against

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the person asking the question in terms of using all of his or her time.

You may continue your response, paying no attention to the light, as though that which you are giving testimony to were part of your original testimony.

I might observe for the record that Judge Claiborne, in fact, has arrived during the course of your answering this questioning, making this part of the presentation, and is in this room.

Mr. HENDRICKS. Thank you, Mr. Chairman.

As I mentioned, on the 10th of July 1984, these counts were dismissed. And on the 10th of July 1984, the defendant filed yet another motion to dismiss, because of alleged grand jury abuse.

On the 12th of July 1984, another defense motion was filed to dismiss the remaining counts because of alleged prosecutorial misconduct. On the 30th of July 1984, these motions were considered and denied by Judge Hoffman.

On the 31st of July 1984, the second trial of the case began, and this time the counts for consideration were the 1979 tax year counts, the 1980 tax year counts, and one additional count which was originally count VII in the case.

The trial proceeded between the 31st of July 1984 and the 10th of August 1984, at which time the jury returned a verdict of guilty as to count V, the 1979 tax count, and as to count VI, the 1980 tax count. The jury returned a verdict of not guilty as to count VII.

The conviction was the 10th of August 1984. On the 24th of September 1984, the defendant filed a post-trial motion for judgment of acquittal in the case, and asserted deficiencies with respect to the sufficiency of evidence, with respect to the selection of jurors, and with respect to the treatment of one witness during the case, and some other matters. All that record, I understand, has been made available to the subcommittee.

On the 2d of October 1984, a hearing was held by Judge Hoffman on the motion for judgment of acquittal, and he denied that motion.

On the 3d of October, Judge Hoffman sentenced Judge Claiborne to 2 years incarceration, and a total of $10,000 in fines, and required him to pay the costs of the prosecution as required by the tax statutes.

On the 3d of October, after the sentencing, the same day as the sentencing, the defendant filed a notice of appeal to the ninth circuit from the conviction. That case number is 84-1294, and was eventually heard by a panel of judges: Judge Pell, Judge McWilliams from the tenth circuit, and Judge Lumbard from the second circuit. Judge Pell is from the seventh circuit.

And I might state that with respect to the direct appeal from the conviction, that in January and February of 1985, the briefs were filed, appellant's briefs, appellee's briefs, and the briefs were filed in the case. And on the 26th of March 1985, that matter was argued before the panel I described.

On the 8th of July 1985, Judge Pell, Judge McWilliams, Judge Lumbard affirmed Judge Claiborne's conviction. On the 5th of August 1985, Judge Claiborne petitioned the court for rehearing, and with a suggestion of rehearing en banc, the entire ninth circuit.

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On the 10th of December 1985, the rehearing was denied by the ninth circuit; and on the 21st of April 1986, the Supreme Court denied certiorari. And after the petition for cert was filed, the second time the case had been to the Supreme Court.

Between the 2d of May of this year and the 12th of May of this year, Judge Claiborne filed 12 additional motions in district court and in the ninth circuit. They included: On the 8th of May of this year, he filed motions to stay the execution of sentence; on the 13th of May of this year, there was argument in the ninth circuit on the question of the stay which had been denied in the ninth circuit. This argument was before Judge Fletcher of the ninth circuit, Judge Beezer of the ninth circuit, and Judge Canby of the ninth circuit. Those judges denied Judge Claiborne's petition for a stay of execution of his sentence pending the resolution of yet another motion, a 2255 motion, a habeas corpus motion, which Judge Claiborne had filed in district court.

Judge Claiborne then petitioned the ninth circuit for rehearing in—excuse me, the ninth circuit, on the 15th of May 1986, denied a rehearing en banc.

On the 14th of May, Judge Claiborne's attorneys contracted Justice Stevens of the U.S. Supreme Court seeking a stay from the Supreme Court pending the resolution of his collateral attack on the indictment, and Justice Stevens denied the stay.

At the present time, there are still seven motions pending. In the ninth circuit, there is a motion for the designation of a new judge. There is a petition for various extraordinary writs in which Chief Justice Burger has been named as a defendant. There is a request for an en banc hearing, an additional en banc hearing in the ninth circuit and in the U.S. District Court for the District of Nevada, there is a motion attacking the conviction collaterally because of an alleged break-in of Judge Claiborne's house.

There is a motion for evidentiary hearing on that question. There is a motion for discovery collateral to that motion, and there is a motion to disqualify the Government prosecutors in the case.

On the 16th of May, 1986, Judge Claiborne's various petitions for stay having been denied, he reported to prison.

That fairly summarizes the chronology of litigation in this case, a case in which the Government would submit Judge Claiborne was given substantial consideration of his legal claims and factual claims by numerous panels of the ninth circuit, by the ninth circuit en banc, by various justices of the U.S. Supreme Court and by a jury of his peers, selected from residents of the State of Nevada. That is my response to your question, sir.

Mr. KASTENMEIER. Is that responsive to your question?

Mr. CATES. Yes.

Mr. KASTENMEIER. Counsel is further recognized, it being understood that that response may have been included as part of the original testimony.

Mr. CATES. Sir, the trial record indicated that at the time of trial, the judge was represented by three attorneys. You spoke about them, maybe I misunderstood, but were there other persons in the course of the process that you described who were representing him besides these three?

Mr. HENDRICKS. Yes, there were.

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Prior to the first trial in the case, I believe that counsel for Judge Claiborne included Mr. Oscar Goodman of Las Vegas, who is present today, Mr. William Raggio from Reno, and Mr. J. Richard Johnston, a specialist in tax matters from Oakland, CA.

In addition, I believe, Mr. John Squire Drendel of Reno, NV, entered an appearance on behalf of Judge Claiborne, and there was a question as to whether Mr. Drendel would be permitted to represent Judge Claiborne, because the Government contended that Mr. Drendel was a fact witness in the case. There was a motion filed by the Government to recuse Mr. Drendel, and Mr. Drendel was ordered recused from the case by Judge Hoffman, so as of the time the first trial started, Judge Claiborne was represented by three lawyers during the course of that trial.

For purposes of appeal, Judge Claiborne has also been represented by other attorneys, including a specialist in constitutional law from the University of Miami, Prof. Terence J. Anderson, and a gentleman from the Cleveland area, and I believe his last name is Katz. I am sorry, I do not recall his first name. Mr. Katz and Professor Anderson have been called upon to prepare briefs, concentrating on the constitutional issues which have been raised pre- and post-trial by Judge Claiborne.

Mr. CATES. Could you tell us what part of the Justice Department you are employed by?

Mr. HENDRICKS. My title, I am the Deputy Chief of the Public Integrity Section of the Criminal Division of the Department of Justice. The Public Integrity Section was created immediately after the revelations in the mid-1970's, relating to Watergate and other such matters involving questions of betrayal of public trust by people employed in the Federal Government and in other positions of substantial public trust.

Our section was created to consider and investigate and prosecute those cases as the Attorney General saw fit.

With respect to Federal judges, the Attorney General has ordered that all allegations involving Federal judges, and prosecutions of Federal judges, if there are any, should be handled by the Public Integrity Section, which is located in Washington, DC, so that suggestions of regional bias or political conflict between a U.S. attorney in, let's say, the District of Nevada investigating a judge on the bench in Nevada would not arise, so that personal conflicts would not arise, so that an investigation would be carried out with objectivity, and without having the investigative process properly subject to criticism because of those kinds of concerns.

Mr. CATES. You indicated that Judge Hoffman was brought in. Where was he from?

Mr. HENDRICKS. Judge Hoffman is a senior district court judge from the Eastern District of Virginia. Judge Hoffman normally sits in Norfolk, but because of his senior status, it is my understanding, because I have tried to contact him around the country, we are aware that he has been sitting in matters around the country, that Judge Hoffman sits by designation in cases with great frequency.

He is from Norfolk, VA, but he sits on cases all over the United States.

Mr. CATES. Do you know whether he is a man who had significant trial experience before this trial?

Mr. HENDRICKS. I do not.

Mr. CATES. When you——

Mr. HENDRICKS. Excuse me, sir. I do know that a year ago, Judge Hoffman was honored with the Devitt Award, which recognizes the outstanding Federal trial judge in the United States. I think that award had nothing to do with this litigation, but recognized Judge Hoffman's year of service as a judge, as a Federal district court judge.

Mr. CATES. Turning to the evidence, you made reference to the black book, exhibit 47. Was that a device that Judge Claiborne had used for recording fees prior to 1979, or prior to the point in time when he went on the bench?

Mr. HENDRICKS. May I have a moment on that?

I have copy in front of me that is a copy of exhibit 47, and that has entries starting in 1976, and I see on the first page, five entries in 1976. On the second page, five entries from 1976, and then proceeding on the third page, entries in 1977, fourth page, entries in 1977 and 1978; 1978, the fifth page, and so on, and to respond to your question, there do appear to be a number of notations reflecting deposits for the period starting on January 26, 1976.

Mr. CATES. In reading the transcript, I concluded that there is a dispute as it relates to how the $22,000 figure, or $23,000 figure came into the knowledge of Mr. Jay Wright. Isn't that disputed?

Mr. HENDRICKS. That is correct.

Mr. Kastenmeier. The Chair will have to intervene at this point. Those are the second bells for a recorded vote on adoption of a rule. The committee will stand in recess for 15 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

Special counsel, having concluded at least tentatively questioning, I would like to now yield to the gentleman from California, Mr. Moorehead.

Mr. MOOREHEAD. Thank you, Mr. Chairman.

Was the Department of Justice involved in any way in the selection of the trial judge?

Mr. HENDRICKS. No, Congressman, we are not.

Mr. MOOREHEAD. That is one of the questions that kind of comes up in some of the arguments.

Would it have made a difference as far as tax liability if there had been a contract of sale or agreement of sale made by Judge Caliborne with his former associates when he left the practices?

Mr. HENDRICKS. No, I do not believe so.

Mr. MOORHEAD. It wouldn't have put it in the capital gains category?

Mr. HENDRICKS. No, sir.

Mr. MOORHEAD. One thing that I was interested in, in your comments as we read the arguments in the case, was the implication that was made from the cashing of the checks without depositing them first. Is it your contention that he had the intent when he cashed the checks never to report it? What is the implication that is drawn from——

Mr. HENDRICKS. Well, there was testimony in the case from Robert Dias, who is employed by the IRS, and is a technical adviser to the regional IRS apparatus in San Francisco, and he had served

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as an expert, summary witness on a number of occasions. It was his testimony that the practice of cashing checks, that a jury can reasonably infer an intent not to report income where the income is cash—where the checks are cashed in the pattern such as that displayed by Judge Claiborne for tax year 1979.

Mr. MOORHEAD. One of the things you brought out and was brought out in the arguments on both sides was the question of whether Judge Claiborne might have been so desperate for money that he would plan to not pay those taxes, and, of course, there was testimony about—in the trial about some $80,000 that he had that had been a gift, I guess $100,000 had been a gift and $80,000 remained in the Horseshoe Casino, and at one time $54,000 sitting in the bank.

When he wrote the letter, is there a chance he was just trying to urge the payment of money that he would like to get on hand, that he wasn't really that hard up?

Mr. HENDRICKS. I don't think so, Congressman. The money that you are alluding to, during the course of the first trial there was evidence that in early 1970's, Judge Claiborne was in the presence of a longtime friend of his, an individual by the name of Syd Wyman. The testimony was that Syd Wyman was a gambler and a person who frequently had a cash box at Caesar's in Las Vegas which was literally filled with cash. And the suggestion was that there were hundreds of thousands of dollars in that box at any one time.

Testimony was in the early 1970's that Syd Wyman gave Judge Claiborne a gift of $100,000 and put that $100,000 in cash in a shoe box, and then the testimony was that it was wrapped in a—gayly wrapped in a Christmas fashion and presented to Judge Claiborne with the notation by Mr. Wyman that it was to Judge Claiborne for all of the various things he had done for people in Nevada but had not been compensated for.

Testimony from defense witnesses was that Judge Claiborne then took that cash, and it was deposited in a special vault, called the Cannonball Vault, at the Horseshoe Casino. The Horseshoe Casino is owned by an individual, one Bennie Binyon, and operated effectively by one or more of Mr. Binyon's sons, and Mr. Binyon has been a close personal friend of Judge Claiborne's, I understand, for a number of years. The testimony was that—defense testimony was that on or about August 1978, Judge Claiborne had an outstanding tax liability of $70-some thousand and that he withdrew the last of the $100,000 which had been in the Cannonball Vault for some years and used that in the first week of September 1978, to pay his outstanding tax liability.

So that this $100,000, which by 1978 became $75,000, was gone and had been used by Judge Claiborne 2 years before the letter he wrote to Mr. Wyman in which he said he was desperately in need of cash, or desperately in need of money.

Mr. KASTENMEIER. The time of my colleague has expired.

The gentleman from Kentucky.

Mr. MAZZOLI. Thank you, Mr. Chairman.

I thank Mr. Hendricks for his testimony today. Let me ask a couple questions. You are an attorney at law?

Mr. HENDRICKS. Yes.

Mr. MAZZOLI. You have been practicing law with the Government for how many years?

Mr. HENDRICKS. Since May 1972.

Mr. MAZZOLI. So you have been with the Government for 14 years?

Mr. HENDRICKS. Yes, sir.

Mr. MAZZOLI. And in what positions have you occupied, just sort of briefly for the record to establish the credentials that you bring today?

Mr. HENDRICKS. From 1972 until 1977, I was an attorney with the Fraud Section of the Criminal Division, Department of Justice, and I tried during that period of time fraud cases in various districts around the——

Mr. MAZZOLI. Can you put a number to it, just off the top, just a round ball park——

Mr. HENDRICKS. I would say 15 to 20 cases, which during that period of time, especially in the midwestern part of the United States, in Utah and South Dakota. There were a number of fraud-type cases that are referred to as advance fee cases. Typically long trials because of the number of victims involved, and I tried a number of those cases in Utah and South Dakota.

Mr. MAZZOLI. Were you lead attorney in any of those cases?

Mr. HENDRICKS. Yes, in virtually all of them.

Mr. MAZZOLI. That takes you to 1977.

Mr. HENDRICKS. 1977. And from September, 1977, to mid 1978, I was an assistant U.S. attorney in the District of Maryland, and while I was an assistant U.S. attorney in Maryland, in Baltimore, I tried a variety of cases, including tax cases, bank robbery cases, forgery and uttering cases——

Mr. MAZZOLI. So I can say for a year and a half or so, you were in the district attorney's office, or the U.S. attorney's office in Maryland, you were in court, you were in Federal courts before Federal judges.

Mr. HENDRICKS. Yes, sir.

Mr. MAZZOLI. Assembling information, preparing a case. Were you lead attorney in any of the cases you tried then?

Mr. HENDRICKS. All of the cases.

Mr. MAZZOLI. That takes you to 1978, or thereabouts?

Mr. HENDRICKS. Yes, sir. At that time, I returned to the Fraud Section, to try a number of cases involving a $15 million fraud that had been perpetrated on the Small Business Administration in Utah, the case is referred to as the Utah Capital Cases, and there were four of them.

Beginning in 1978 and continuing through 1980, I tried three of the four cases, I believe one of them resulted in guilty pleas.

Mr. MAZZOLI. In many of these cases, did you have opportunity to prepare appeals and to supervise the case beyond the trial stage but into the appellate stage?

Mr. HENDRICKS. Yes, sir, I did.

Mr. MAZZOLI. Did any of the cases prior to that time go to the Supreme Court? Did you have occasion to get into the appellate—appeals at the Supreme Court level?

Mr. HENDRICKS. Our office would not handle litigation for the Supreme Court.

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Mr. MAZZOLI. That would be Mr.——

Mr. HENDRICKS. The Solicitor General's Office.

Mr. MAZZOLI. Thank you very much.

Mr. HENDRICKS. I believe, to be more responsive, that one or two of the Utah cases did go to the Supreme Court, petition for writ of certiorari were filed, they were denied.

Mr. MAZZOLI. Which suggests in your mind what?

Mr. HENDRICKS. That the Supreme Court was not interested in the real issues presented.

Mr. MAZZOLI. The care had been taken below to dispose of all the rights and duties of a fair trial essentially?

Mr. HENDRICKS. We did the best we could.

Mr. MAZZOLI. Proceed and tell us a little bit more about your career.

Mr. HENDRICKS. In mid-1980, I was asked to become the Deputy Chief of the Public Integrity Section, and from mid-1980 until today, through today, I have been a deputy—deputy chief, which means I supervise all of the cases in our section that relate to abuses of trust, if you will, by Federal employees, as distinguished from State employees and certain other areas we were involved in. All of those cases, and I have participated in the trial of some of those cases.

Mr. MAZZOLI. Would you put yourself in the category, and I know it is tough to be candid about yourself, we have a tendency to be modest, but would you consider yourself to be a good lawyer, a good Federal employee, a good prosecutor, a good manager of large and very burdensome and complex litigation?

Mr. HENDRICKS. Yes.

Mr. MAZZOLI. I appreciate your being restrained about the answer, because it proves your modesty.

Let me ask one question, my time is about to expire, can you just tell me, without getting into all the folderol, in your judgment, as a careerist in the Government, as a very distinguished trial attorney, was this case conducted correctly; and is there any error, in your knowledge, to your knowledge, that would cause any holding, any aspect of the conviction to be subject to legal doubt?

Mr. HENDRICKS. I would respond yes to your first question and no to the second.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Ohio, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. Hendricks, thank you for your testimony and the differentiation that you provided during it of that part of the evidence which was contested.

Going to the 1980 tax return, which was prepared in the first part of 1981, it is my understanding from your summary of the evidence that there was an extension of time for filing the 1980 final return and that at that time it was shown that there would have been an expectation of a tax liability of some $40,000 plus on the part of Judge Claiborne. Is that correct?

Mr. HENDRICKS. Yes, sir. On April 13, 1981, Judge Claiborne filled out a request for extension to file U.S. individual tax return, that is Government's exhibit 4 in the case, and he estimated that his liability would be $42,847.96.

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Mr. KINDNESS. Does the evidence show, evidence in the trial show that there was payment of the major portion, the 80 percent, or whatever, of that tax liability on or prior to that date?

Mr. HENDRICKS. Yes, it does.

Mr. KINDNESS. And later——

Mr. HENDRICKS. Could I—I might clarify.

Mr. KINDNESS. Surely.

Mr. HENDRICKS. The refund, which was eventually obtained, effectively refunded the payment made in anticipation of the tax liability and additional moneys.

Mr. KINDNESS. That was the remainder of my question there, and I thank you for those answers and yield back, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Ohio yields back. The gentleman from Ohio, Mr. DeWine, you are recognized for 5 minutes.

Mr. DEWINE. Thank you very much, Mr. Chairman.

Mr. Hendricks, could you tell me a little bit more about the checks that were issued in 1980? I see two of these came from James Brown. What can you tell us about the other two?

Mr. HENDRICKS. Well, my belief is that the first check, issued the 31st of December 1979, and received by Judge Claiborne the first week of January 1980, was written on an account maintained by Peter Echeverria. Mr. Echeverria, to my knowledge, is a prominent attorney in Nevada and is a person who was a friend and professional associate of Judge Claiborne's. I believe they had associated themselves prior to Judge Claiborne's leaving his private law practice in a lawsuit, and I believe the testimony was that Mr. Echeverria and Judge Claiborne had some difficulty in collecting their fee from the client, and there had been some litigation which had resulted in this period of time, that is that resulted in some prolongation in the period required to collect the fee, that in December 1979, Mr. Echeverria had been successful in collecting the fee and that Mr. Echeverria had then written the $42,000 check to Judge Claiborne and Judge Claiborne's portion of the fee for the work that Judge Claiborne did in that case.

Mr. DEWINE. Did this information come out at the trial?

Mr. HENDRICKS. Yes, sir.

Mr. DEWINE. What about the other check?

Mr. HENDRICKS. The $37,500 check also involved the same Syd Wyman. Syd Wyman, you will recall from my earlier testimony, is the man who was apparently a professional gambler, and he died in the mid-1970's, and Judge Claiborne had done legal work for Mr. Wyman. The law firm of Hochman, Salkin & DeRoy represented the estate of Mr. Wyman, and I believe that Mr. Rothman was either executor or held an analogous position vis-a-vis the Wyman estate. Judge Claiborne in August 1980 wrote to Mr. Rothman and requested that his fee for this work done for Mr. Wyman be sent to him at the earliest possible date, because he was desperately in need of money.

Mr. Rothman authorized the law firm of Hochman, Salkin & DeRoy to make this disbursement from the estate——

Mr. DEWINE. So this is a claim against the estate then?

Mr. HENDRICKS. Yes, sir. The other two checks, as you have noticed, come from James Brown and were made pursuant to the fee

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splitting agreement that I have mentioned, which Judge Claiborne entered into with Mr. Brown in the summer of 1978.

Mr. DEWINE. There was testimony at trial to support that too?

Mr. HENDRICKS. Yes, sir. Mr. Brown testified, Mr. Rothman testified, I believe Mr. DeRoy testified, and Mr.— I believe Mr. Echeverria also testified.

Mr. DEWINE. I realize this is in the trial transcripts, but could you tell me, give me the outline of what the counts were in the first trial, what the counts were in the second trial, and the disposition of each?

Mr. HENDRICKS. Yes, sir. The first count in the indictment was a count brought under the bribery statute, 18 United States Code, section 201. That count charged that in December 1978, Judge Claiborne had taken a $30,000 bribe from one Joseph Conforte in order to influence an official judicial decision of his. That is to say, a ruling on a motion to quash grand jury subpoenas which had been issued by the U.S. Attorney's Office in Reno. The jury was unable to reach a verdict as to that count, and it was in the summer of 1984 dismissed on motion by the Government.

The second count of the original indictment was an indictment— was a count which charged Judge Claiborne with a violation of the wire fraud statute, section 1343. In essence, that count charged Judge Claiborne devised a scheme to defraud Joseph Conforte by telling him Judge Claiborne could influence a panel of judges of the ninth circuit who were sitting on appeal from Mr. Conforte's conviction for tax offenses.

The members of the panel were James Kennedy, Thomas Tang from Arizona, and Judge Edmund Polmeri from New York.

Mr. KASTENMEIER. I would advise the witness and the gentleman from Ohio we are now getting outside the scope when we get into the first trial. It is all right, I think, to denominate what the counts were procedurally, but we are not interested in the substance of the first trial. That is not before the committee, and I would caution both——

Mr. DEWINE. Maybe if you could just very quickly, then, list what the charge was without getting into the details. Just so I can get the overview of this, and then tell the disposition.

Mr. HENDRICKS. The second count, the jury in the first trial deliberated on that count, it went to the jury, they were unable to reach a verdict on that count, and it was later dismissed on motion of the Government.

The third count charged Judge Claiborne with an obstruction of justice in connection with the alleged attempt to have an attorney testify falsely in a grand jury. That count went to the jury in the first trial, and the jury was unable to reach a verdict. It was dismissed with prejudice on motion of the Government.

The fourth count was a tax count judging him with a violation of section 7206(1) of the tax title, Title 26, and it related to income for the September through December 1978, for that brief period of time in 1978 after he had become a Federal judge. That count was a count which the jury was unable to reach a verdict on in the first trial, and it was dismissed on motion of the Government in the summer of 1978.

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The fifth count charged him with false statements on the 1979 return. I have described that. The jury in the first trial was unable to reach a verdict. The Government proceeded to trial during the second trial on that count, and the jury convicted Judge Claiborne by a unanimous decision. The sixth count was a count charging Judge Claiborne with violation of section 7206 in connection with his 1980 return. I have described that. That was a count which the jury in the first trial was unable to reach verdict on. The Government proceeded to trial in the second trial on it, and the jury reached a unanimous verdict of guilty on that count. He was sentenced on those two counts by Judge Hoffman.

The final count, count seven, was a count that related to the Ethics in Government Act filings which Judge Claiborne made, and it charged that Claiborne had failed to report the $75,000 figure that Congressman Moorhead inquired about on his Ethics In Government filing for 1978. And the jury in the second trial acquitted Claiborne of that count.

Mr. DEWINE. I have no other questions.

Mr. KASTENMEIER.The time of the gentleman has expired.

The gentleman from Oklahoma, Mr. Synar.

Mr. SYNAR. Thank you, Mr. Chairman. I have just one question. At any time did Judge Claiborne challenge the jury for biased or illegal activities?

Mr. HENDRICKS. Judge—well, as to the second part of your question, he has never challenged the jury for illegal activities. He has raised the charge in his direct appeal regarding a motion to remove a juror, to strike two jurors for cause. That was litigated in his appellate briefs, the Ninth Circuit Court of Appeals affirmed the conviction. After response from the Government, the ninth circuit refused to hear the matter en banc and denied cert.

Mr. SYNAR. But never challenged for bias.

Mr. HENDRICKS. No, sir.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. COBLE. Thank you. I too express appreciation for your appearance here today. I don't think this question has been asked. If so, I missed it. I assume the checks that appear on the two documents that you made available to us, Mr. Hendricks, represent fees that were incurred prior to Judge Claiborne's having been appointed to the district—to the Federal bench, is that correct?

Mr. HENDRICKS. That is correct, sir.

Mr. COBLE. Without exception, they all occurred prior to that time?

Thank you. I have no further questions.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. I have no questions.

Mr. KASTENMEIER. Although the gentleman from Wisconsin is not a member of the subcommittee, does the gentleman have any questions?

Mr. SENSENBRENNER. I have no questions, Mr. Chairman.

Mr. KASTENMEIER. I would like to return now to special counsel.

Mr. CATES. I have no questions.

Mr. KASTENMEIER. The gentleman from California, Mr. Moorhead.

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Mr. MOORHEAD. I have one or two additional questions I would like to ask. How did the Government obtain Judge Claiborne's tax returns for the year 1979 and 1980?

Mr. HENDRICKS. The Government received information that Judge Claiborne had committed bribery in 1978 and in 1979. The Government made an ex parte request authorized by a district court judge to obtain the 1978 and 1979 tax returns in order to determine whether or not any of those moneys characterized by some as bribes had been reported as income. That early request for the 1978 and 1979 tax returns was made in connection with a bribery investigation and possible—a bribery investigation and extortion. It was subsequently learned during the course of interviews about the fee splitting arrangement, and after comparing the information received from the witnesses with the tax returns which had been obtained in connection with the bribery investigation, it was noted that none of the fees were reported as income.

That led later to the request for additional tax returns and led to the tax investigation.

Mr. MOORHEAD. You got the returns from the IRS, then?

Mr. HENDRICKS. Yes, sir.

Mr. MOORHEAD. And it was on a court order?

Mr. HENDRICKS. Yes, sir.

Mr. MOORHEAD. Do you believe even if Judge Clairborne signed his 1979 return in blank, which is I understand the position that the defendant took in the trial, it would be a violation of 26 U.S. Code 7206(1)?

Mr. HENDRICKS. May I have just a moment?

Mr. MOORHEAD. Sure.

Mr. HENDRICKS. Congressman, of course, the Government's position was that he did not sign it in blank during the trial. I do not know the answer to that question. I will be happy to check and determine what the appropriate position is.

Mr. MOORHEAD. I have no further questions.

Mr. HENDRICKS. If I may, just very briefly, I believe that signature on the form—that the law is that the signature on the form indicates and states explicitly that the signer of the form is responsible for the representations made on the form and he adopts the statements on the form; that he holds himself responsible for knowing what is on that tax return.

So I would say tentatively the answer to your question is yes, that he is responsible. Of course, the Government's position was he knew what was on the return when he signed it.

Mr. MOORHEAD. Thank you.

Mr. KASTENMEIER. The Chair might make a comment on the latter two questions. It may or may not be within the scope, but the manner in which certain evidence is obtained may not necessarily be relevant to this inquiry; the exclusionary rule and other such rules in the Chair's opinion are not applicable here.

Apparently, the ultimate fact is whether these returns represent an untruthful return. But, in any event, I yield to the gentleman from Ohio.

Mr. KINDNESS. I thank the Chairman. I have just two quick questions.

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One, is there any evidence in the trial that was adduced as to whether the returns of Judge Clairborne for 1979 and 1980 tax years were on a cash or accrual basis? They have been discussed as though it were a cash basis.

Mr. HENDRICKS. Yes, sir. The evidence was that Judge Claiborne consistently prepared his tax returns on a cash basis.

Mr. KINDNESS. And was there ever any claim in the trial, the second trial being most pertinent, that any other questioned income had been reported in prior years as income and tax paid on it?

Mr. HENDRICKS. No, sir.

Mr. KINDNESS. I thank the gentleman, and I would yield back, Mr. Chairman.

Mr. KASTENMEIER. Are there any further questions of the witness?

If not, the committee thanks you, Mr. Hendricks, and your colleague, for appearing here this morning.

I think just one question remains unanswered, and you can make that answer available possibly during the course of the day, if possible.

Mr. HENDRICKS. I will do that, Mr. Chairman.

Mr. KASTENMEIER. Does the gentleman from New York have any questions of the witness?

Mr. FISH. No.

Mr. KASTENMEIER. If not, that concludes the testimony of Mr. Hendricks and the Justice Department on the question before us. I thank you for your appearance.

The Chair will now call our former colleague, Judge Wiggins, if he is ready to appear. I think we will have a period of time when we will not be bothered by votes. And, after Judge Charles Wiggins testifies, we will then take a substantial recess for lunch.

STATEMENT OF HON. CHARLES E. WIGGINS, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Judge WIGGINS. Copies of my testimony, Mr. Chairman, are here.

Mr. KASTENMEIER. Would staff make available copies of the testimony of our next witness to the members?

I take great pleasure in reintroducing to the committee the Circuit Court of Appeals Justice Charles Wiggins, who 12 years ago was a member of this committee when another impeachment process was undertaken. We value his judgment in both capacities.

It has come to the Chair's attention—and I am sure the gentleman—as Judge Wiggins knows—that we have been informed as of this morning that the ninth circuit had indeed issued a certificate to the judicial conference. We do not have the text of it, but I assume that the disciplinary problem involving Judge Claiborne cannot be resolved by the ninth circuit and is referrable up to the judicial conference for appropriate disposition, which is what the statute contemplated.

I note that, as a member of that court, you should be aware of it. In any event, we are pleased to hear your testimony. As with other witnesses, you should be informed that the rules of the House and

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rules of the committee are at the witness table, and I will now administer the oath.

[Witness sworn.]

Mr. KASTENMEIER. Please be seated, and we will be pleased to hear your testimony.

Judge WIGGINS. Mr. Chairman and members of the committee, my name is Charles Wiggins. I am a judge of the U.S. Court of Appeals for the ninth Circuit. I reside in San Francisco. I offer my testimony today at the request of the committee. In no sense am I a volunteer as a witness, nor have I been assigned this responsibility by my court or by any other court or judicial officer. I appear solely because the Congress has requested that I do so. [See appendix I.]

To my knowledge, I have never met Judge Claiborne. I have no direct knowledge of the acts or omissions that resulted in his indictment and subsequent conviction of a Federal crime. The case of *United States* v. *Claiborne*, which was tried in the district court in Nevada, was appealed to the ninth circuit while I was a member of that court. The issues on appeal were purely legal in nature and gave me no special insight with respect to the underlying facts of the *Claiborne* case.

For the information of the committee, the direct appeal of Judge Claiborne from his conviction is now final. It is my understanding that the judge may be pursuing a collateral attack on that conviction, and he has been confined confided. If so, that issue has not been considered by a merits panel of our court.

Because members of this committee have expressed to me a concern about the failure of the ninth circuit to invoke the procedure of the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980 in the case, let me begin by explaining our actions.

Quite simply, following the conviction of Judge Claiborne and the exhaustion of his right of direct review of that conviction, there was no acute awareness that any action was required under the act. This legislation, as this committee knows, is relatively new; and fortunately our circuit does not have much experience in its use.

The perception existed that the act was intended to deal with lawyer and litigant complaints against a judge. Such complaints, of course, might reveal impeachable misconduct, in which case referral to the Congress would be appropriate. But I believe the legislation anticipated that most complaints would be of a lesser magnitude, would be investigated by the judicary itself; and, if corrective actions were necessary, it would be taken at that level.

The conviction of a Federal judge of a felony and his sentence to prison is, however, an entirely different matter and on an entirely different order of magnitude. In any event, Chief Judge Browning of the ninth circuit ordered a study of the act to be undertaken immediately following the confinement of Judge Claiborne. That study revealed that a citizen complaint against Judge Claiborne was not necessary in order to trigger action by the counsel.

Prior to that study, there was a general perception that the act was triggered by a citizen complaint. Accordingly, it is my understanding that the council intends--and I have been informed this morning that it indeed has certified that one or more grounds for

impeachment against Judge Claiborne might exist. That certificate has been forwarded, I am told, to the Judicial Conference of the United States, as is provided by the statute.

The Judicial Conference probably will certify to the House of Representatives its determination that impeachment may be warranted in the language of the statute as is provided in section 372(c)(8) of that act.

Now, all of the foregoing occurred within weeks after Judge Claiborne was finally sentenced. I understand that some members of this committee are critical of the circuit for not acting more promptly, and perhaps that criticism is justified. But I personally do not feel that it is.

I believe that the circuit and the judges of the circuit, acting in a strange milieu, a strange environment, proceeded with all deliberate speed under the circumstances of this case. In my view, however, that is a case in which the House of Representatives should exercise its independence and sole power of impeachment, and should not defer even in a pro forma sense to any other branch. If it were to do so, the House would be deferring to the operation of a statutory scheme which provides an intricate mechanism for the investigation of charges and a certain limited right of review, both at the circuit level and at the Judicial Conference level.

Such a procedure—and the process it provides for judges facing complaints—may be wholly appropriate in a routine case. In an extraordinary case, however, like the present one, Congress should not await the exhaustion of that administrative process before taking action on its own. Such deference, in my opinion, skews a carefully crafted system of constitutional checks and balances.

The legal responsibility and the political accountability for impeacement lies with the legislative branch, and not the judicial branch.

Mr. Chairman, it is my understanding the committee may wish me to testify concerning the question of whether Judge Clairborne has served with good behavior, as that term is used in Article III of the Constitution. Obviously, therefore, this committee seeks my opinion rather than any facts known to me.

Judges of the United States shall hold their office during good behavior—that is taken from Article III of the Constitution. The framers were determined to establish an independent judiciary. Article III reflects that concern. They had observed the nomination of judges in the Colonies, their arbitrary reduction of compensation, withdrawal of judicial commissions as retaliation for unpopular decisions.

The term "good behavior" found in Article III was included in the Constitution to ensure judicial dependents from arbitrary removal from office. As such, it is a term defining tenure rather than a term defining a course of conduct, the deviation from which would presumptively authorize removal from office.

The impeachment power, that is the power to remove, is found in Article II, not in Article III. Unlike the good behavior clause found in Article III, the impeachment power specifies that conduct that justifies removal from office—namely, treason, bribery or other high crimes, and misdemeanors. This section, of course, applies to U.S. judges.

Many commentators have expresssed the view that impeachment of a Federal judge does not lie for criminal misbehavior alone. This body of opinion relies upon the precedence of judicial impeacement, particularly in this century. Each such impeachment that resulted in a conviction—and there have been only four—alleged misconduct that was arguably criminal in nature.

It is also true, however, that the Archbald and Ritter impeachments alleged misbehavior that was noncriminal, as well.

The true meaning of these precedents has been debated in the literature for years. The historically correct interpretation is not particularly relevant to this case, however, because Judge Claiborne stands convicted of a serious Federal crime.

A finding of misbehavior in office, Mr. Chairman, is not a constitutional prerequisite to the impeachment of a Federal judge. A finding that he is guilty of treason, bribery or other high crimes, and misdemeanors, is a constitutional prerequisite. Nevertheless, whether a Federal judge has comported himself with good behavior is an intensely practical consideration in determining whether the impeachment power should be exercised in a given case.

Congress is under no compulsion, constitutional compulsion, to impeach at all. It may do so in the exercise of its discretion. Whether that discretion is exercised in the case of a particular judge should depend, in large part, on whether that judge has fallen below minimum standards of conduct for a person in his position, regardless of whether that misconduct is criminal or not.

It is not my purpose, Mr. Chairman, to marshal arguments to support the self-evident proposition that a U.S. judge convicted of a felony is guilty of a lack of good behavior. He has misbehaved in office by reason of his conviction alone.

Further, he has misbehaved by reason of the misconduct proven beyond a reasonable doubt upon which the conviction works—whether that conduct occurred before or during his tenure as a Judge.

In my view, the conviction of Judge Claiborne does more than stain his personal reputation. I believe it brings into disrepute the judiciary as a whole. I confess an inability to provide this committee with direct evidence establishing that the judiciary has been adversely affected by the conviction of one of its members. However, we know that his trial and his conviction were widely reported by the media.

We also know that the continued compensation of Judge Claiborne, while confined to prison, has been the subject of public criticism. It is highly unlikely, in my opinion, that the fact of Judge Claiborne's conviction, his sentencing and continued compensation while in prison are widely known.

The absurdity of such a spectacle is surely evident to all. Public confidence in the judiciary, and I believe in the Congress as well, will suffer if such an absurdity continues uncorrected.

This judge—that is, me—is embarrassed by the conduct of one of our members. It is my opinion that the misdeeds of a particular member of the judiciary tends to cast a pall on the judiciary as a whole.

The first canon of judicial conduct reflects my view. That canon states:

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An independent and honorable judiciary is indispensable to justice in our society. A Judge should participate in establishing, maintaining and enforcing, and should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.

What is at stake, I think, is the independence of the judiciary. For the stuff that holds a democratic society together is in the end the consent of our people. Congress exercises legislative power because the people have given it that right to exercise. The judiciary resolves cases and controversies binding on the people because the people have agreed to be bound.

Public confidence in the executive, legislative, and judicial branches is essential to the continuity of our system. Public confidence in the judiciary, I believe, is eroded by the irresponsible and improper conduct of a particular judge. A judge cannot expect to compel compliance with the law if he himself is a lawbreaker.

It is not my province, Mr. Chairman, to advise this committee whether it should or should not adopt articles of impeachment charging Judge Claiborne with high crimes and misdemeanors. I do recommend that this committee not charge Judge Claiborne with misbehavior in office as a separate impeachable offense. Although the power to do so may exist, it is not necessary in this case, given the facts before the committee.

However, I believe this committee may properly consider evidence of a lack of good behavior in the exercise of its prosecutorial discretion to impeach or not. In my view, a lack of good behavior has been demonstrated in this case.

That concludes my prepared testimony, Mr. Chairman, and I should be pleased to respond to any questions the committee may have of me.

[The written statement of Judge Wiggins follows:]

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TESTIMONY
OF
JUDGE CHARLES E. WIGGINS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Charles E. Wiggins. I am a Judge of the United States Court of Appeals for the Ninth Circuit. I reside in San Francisco, California.

I offer my testimony today at the request of the Committee. I have not volunteered as a witness, nor have I been assigned this responsibility by my court or by any other judicial officer. I appear solely because the Congress has requested that I do so.

To my knowledge, I have never met Judge Claiborne. I have no direct knowledge of the acts or omissions that resulted in his indictment and subsequent conviction of a federal crime. The case of United States v. Claiborne which was tried in the District Court in Nevada was appealed to the Ninth Circuit while I was a member of that Court. The issues on appeal were purely legal in nature and did not give me any special insight into the underlying facts of the Claiborne case.

For the information of the Committee, the direct appeal of Judge Claiborne from his conviction is now final. It is my understanding that the Judge is pursuing a collateral attack on his conviction and confinement. If so, that issue has not yet been considered by a merits panel of our court.

Because Members of this Committee have expressed concern about the failure of the Ninth Circuit to invoke the procedure of the Judicial Councils Reform and Judicial Conduct and Disability Act of

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1980 in this case, let me begin my testimony by explaining our actions.

Quite simply, following the conviction of Judge Claiborne and the exhaustion of his rights of direct review of that conviction, there was no acute awareness that any action was required under the Act. This legislation is new, and, fortunately, our Circuit does not have much experience in its use. The perception existed that the Act was intended to deal with lawyer and litigant complaints against a judge. Such complaints might reveal impeachable misconduct, in which case referral to Congress would be appropriate. However, I believe the legislation anticipated that most complaints would be of a lesser magnitude, would be investigated by the Judiciary itself, and if corrective action were necessary, it would take it at that level. The conviction of a federal judge of a felony, and his sentence to prison, is an entirely different matter.

In any event, Chief Judge Browning ordered a study of the Act to be undertaken on behalf of the Judicial Council following Judge Claiborne's confinement. That study revealed that a citizen complaint against Judge Claiborne was not necessary in order to trigger action by the Council. Accordingly, it is my understanding that the Council intends to certify to the Judicial Conference its determination that one or more grounds for impeachment for Judge Claiborne might exist, and may have already done so.[1] The Judicial Conference of the United States will doubtless certify to the House

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[1] The Act incorrectly refers to Article I of the Constitution in § 372(c)(7)(B)(i).

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of Representatives its determination that impeachment may be warranted, as provided in Section 372(c)(8) of the Act.

All of the foregoing occurred within weeks of Judge Claiborne's sentence. Perhaps the Circuit is justly to be critized for not acting more promptly. Personally, I believe the Circuit has acted with all deliberate speed under the circumstances.

In my view, this is a case in which the House of Representatives should exercise its independent and sole power of impeachment and should not defer, even pro forma to any other branch. If it were to do so, the House would be deferring to the operation of a statutory scheme which provides an intricate mechanism for the investigation of charges and a right to limited review, both at the Circuit Council and Judicial Conference level. Such a procedure, and the process it provides to Judges facing complaints, may be wholly appropriate in a routine case. In an extraordinary case, however, like the present one, Congress should not await the exhaustion of that administrative process before taking action on its own. Such deference skews a carefully crafted system of constitutional checks and balances.

Mr. Chariman, it is my understanding that the committee wishes me to testify concerning the question of whether Judge Claiborne has served with "good Behaviour" as that term is used in Article III of the Constitution. Obviously, therefore, the Committee seeks my opinion rather than any facts known to me.

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Judges of the United States "shall hold their offices during good Behaviour . . . " Article III, Section 1, United States Constitution.

The framers of the Constitution were determined to establish an independent judiciary. Article III reflects that concern. They had observed the domination of judges in the colonies by the arbitrary reduction of their compensation and withdrawal of judicial commissions, as retaliation for decisions unpopular with the King and his Ministers. The term "good Behaviour" was included in the Constitution primarily to insure judicial independence from arbitrary removal from office. As such, it is a term defining tenure rather than a course of conduct, a deviation from which would justify removal from office.

The impeachment power is found in Article II. Unlike the good behavior clause, it specifies the conduct that justifies removal from office: " . . . Treason, Bribery, or other high Crimes and Misdemeanors" Article II, Section 4. This section applies to all civil officers including United States judges.

Many distinguished commentators have expressed the view that impeachment of a federal judge does not lie for non-criminal, "misbehavior" alone. This body of opinion relies upon the judicial impeachment precedents, particularly in this century. Each such impeachment that resulted in a conviction alleged misconduct that was arguably criminal in nature; however, it is also true that the Archibald and Ritter impeachment alleged misbehavior that was clearly non-criminal as well.

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The true meaning of these precedents has been debated in the literature for years. The historically correct interpretation is not particularly relevant to the Claiborne case, however, because he stands convicted of a serious federal crime.[2]

A finding of misbehavior in office is not a constitutional prerequisite to the impeachment of a federal judge. Nevertheless, it is an intensely relevant consideration in determining whether the power shall be exercises in a given case. Congress need not impeach as a matter of constitutional compulsion. It may do so in the exercise of its discretion. Whether that discretion is exercised in the case of a particular federal judge should depend in large part on whether that judge has fallen below minimun standards of conduct for a person in his position, regardless of whether his misconduct is a crime.

I will not marshal arguments to support the self-evident proposition that a United States Judge convicted of a felony is guilty of a lack of good behavior. He has misbehaved in office by reason of his conviction alone. He has also misbehaved by reason of the misconduct, proven beyond a reasonable doubt, upon which the conviction rests, whether that conduct occurred before or during his tenure as a Judge.

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[2] In my view, the debate has lost all practical significance in light of current political realities. A judge who acts in a manner that is perceived by the Congress to be intolerable will be impeached regardless whether his misconduct is criminal in nature. Congress in its Bill of Impeachment will probably characterize such intolerable conduct as "misbehavior and a high misdeameanor" in office, as it has done of the case of all judicial impeachment since the civil war.

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The conviction of Judge Claiborne does more than stain his personal reputation. I believe it brings into disrepute the judiciary as a whole. I confess an inability to provide this committee with direct evidence establishing that the judiciary has been adversely effected by the conviction of one of its members. However, we know that his trial and conviction were widely reported by the media. We also know that the continued compensation of Judge Claiborne while confined to prison has been the subject of public criticism. It is highly likely, in my opinion, that the fact of Judge Claiborne's conviction, sentencing and continued compensation are widely known. The absurdity of such a spectacle is surely evident to all.[3] Public confidence in the Judiciary - and the Congress - will suffer if such an absurdity continues uncorrected.

This Judge, at least, is embarassed by the conduct of one of our members. It is my opinion that the misdeeds of particular Members of the Judiciary tend to cast a pall on the Judiciary as a whole. The first Canon of Judicial Conduct reflects my view: "An independent and honorable judiciary is indispensible to justice in

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[3] In 1905, during the Senate trial of the impeachment of Judge Charles Swayne, Congressman James Perkins was a Manager for the House. The argument was made that criminal misconduct not occurring during the course of a Judge's duties was not impeachable. Congressman Perkins responded: "They say, and say justly, that when this judge forged a note, or embezzled money, he was not acting as a judge, but as an individual. And if the argument be just, we have this extraordinary conclusion: A judge cannot be removed except by impeachment. The judge, for the crime committed in his private capacity, is serving his term in State prison. As he marches to perform hard labor, he will once a month receive the consolation of opening the envelope containing the check which will be monthly sent to him to pay his salary as a judge of the United States court. Such a result shows the absurdity of the position." Impeachment Materials, p. 38. That Judge Swayne was acquitted makes the spectacle no less absurd.

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our society. A Judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."

The stuff that holds a democratic society together is the consent of the people. Congress exercises legislative power because the people have given it that right; the Judiciary resolves cases and controversys binding on the people because the people have agreed to be bound. Public confidence in the Executive, Legislative and Judicial Branches is essential to the continuity of the system. Public confidence in the Judiciary is eroded by the irresponsible and improper conduct of a particular Judge. See Commentary, Canon 2, Code of Judicial Conduct.

It is not my province to advise this Committee whether it should adopt Articles of Impeachment charging Judge Claiborne with high crimes and misdemeanors. I do recommend that this Committee not charge Judge Claiborne with misbehavior in office as a separate impeachable offense. It is not necessary, given the facts of this case. However, I believe this Committee may properly consider evidence of a lack of good behavior in the exercise of its prosecutorial discretion to impeach or not. In my view, a lack of good behavior has been demonstrated in this case.

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Mr. KASTENMEIER. We thank you for that presentation.

I would like to yield to special counsel, Richard Cates.

Mr. CATES. Sir, would you just tell for the record what your legal background and experience has been, sir?

Judge WIGGINS. Yes, sir.

I practiced law for slightly over 10 years in California before I was elected to the Congress. I practiced law aggressively in both State and Federal courts before I was elected to Congress. I served 12 years in the Congress and was a member during that 12-year period of this committee.

I left the Congress and thereafter returned to the practice of law, and served for another 6 years before I was appointed to my present position.

As a lawyer following my service in Congress, and before my appointment, I was in Federal court as well as State court as often as I could get there.

Mr. CATES. Sir, with respect to—as we understand it, there is a collateral attack being made on the judgment of conviction. If any, would you attach to that fact as it might relate to the use of a conviction if it were decided as an impeachable offense?

Judge WIGGINS. In my view, it would depend upon the basis of the collateral attack. If that attack in any way brought into question the integrity of the fact-finding process, casting a doubt as to what in fact occurred, and if those facts were challenged by the respondent—for example, in this case—then I think it would be quite relevant.

If, however, the collateral attack were on other issues that did not go to the merits—for example, a fourth amendment challenge would be an illustration of that—then I think it would be utterly irrelevant.

Indeed, the whole pendency of the criminal case with respect to this proceeding is of importance, but not critical importance. I believe this Congress has an independent responsibility to assess the conduct and to characterize it as a high crime or misdemeanor. But, in doing so, it can accept as true unchallenged conduct found to be true by a court—that gives, I think, full faith and credit to the operation of the judicial branch in another proceeding. And I think it recognizes that the standard of proof in a criminal case beyond a reasonable doubt is a higher standard of proof than is normally and historically required by this committee.

Under those circumstances, any collateral attack which does not go to the merits, I think, is irrelevant; and this committee can accept as true the findings of the trail court.

Mr. CATES. Sir, this may not be tremendously germane, but I—in this case, the proof shows that Judge Claiborne, when he was sitting, was still in the process of dividing fees with practicing attorneys who had cases that were pending or still operative, and I guess—do you have any knowledge or opinion as to whether or not that is an appropriate way to wind down a practice?

Judge WIGGINS. I do not have any personal knowledge of the facts as you revealed them. I believe, however, that the problem is sufficiently common that there are advisory opinions found in the canons, interpretive notes that deal with that problem.

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I have heard other Federal judges say that there appointment to the bench has resulted—required that they withdraw, of course, from their prior judicial practice, and that there was a financial settlement resulting from that withdrawal.

To my knowledge, in all cases, it has not resulted in an immediate cash payout, and therefore it is possible that a sitting judge may over a finite period of time receive money, not for current legal services but for services previously performed.

However, if that exists, I believe it to be unquestioned practice that the judge will recuse himself from all matters affecting that former office, because of the appearance of impropriety situation.

I hope I have been responsive.

Mr. CATES. I have nothing further.

Mr. KASTENMEIER. The gentleman from New York, Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman.

Thank you, Judge Wiggins, for your very thoughtful analysis. I just want to see if I can summarize and get your opinion as to whether I have understood it. You have given us the language in Article III of "Judges of the United States shall hold their office in good behavior," and explained that this was in the Constitution primarily to ensure judicial independence. As such, it was defined as tenure instead of a course of conduct, but that a finding of misbehavior in office is not necessary for this panel, although it is relevant to determining whether to exercise the impeachment power.

You concluded that the U.S. judge convicted of a felony is guilty of a lack of good behavior. Is that a fair summary of the analysis of that part?

Judge WIGGINS. Yes.

I interject, frankly, the issue of whether misbehavior alone is an impeachable offense, because I was of the opinion that the committee wished me to address that subject. But it is extraneous to the facts of this case. The committee is not looking at a situation in which a judge is guilty of misbehavior alone, which is not criminal. So, I think it is extraneous.

I have addressed it because I believe the committee wished me to do so.

Mr. FISH. If we didn't have the criminal conviction in front of us, it would be a different case?

Judge WIGGINS. Yes, it would be a different case.

Mr. FISH. So, I do understand your position then to say that we didn't look at the impeachment power in Article II that justifies removal for treason, bribery or high crimes, and misdemeanors, and that is the finding that is necessary for us in terms of a constitutional prerequisite to impeachment, and the conviction before us does qualify under that language as high crimes.

Judge WIGGINS. Yes, sir, it is my view. At least, we have a conviction of a felony, a Federal offense, which is a felony, and I think under any reasonable interpretation of the words "high crime," that such a felony would fall under that definition.

Mr. FISH. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Frank.

The gentleman from Ohio, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

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I would like to thank Judge Wiggins for his participation in this inquiry today, and the preparation for it, which I think is reflected in the thoughtful presentation. I have always had a great deal of respect for the opinion of Judge Wiggins when we were in agreement.

Thank you, I yield back, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. I wonder, since you have been through this before, and thought about it a great deal, can you shed any more light on the phrase other high crimes and misdemeanors.

Where did that come from, and what is your understanding of what it means? I appreciate the fact that you have testified that the felonies involved in this case would qualify for that. Would you give us a broader view of what that phrase means, where it comes from?

Judge WIGGINS. I am not here as a legal historian, and accordingly, I would not wish the committee to rely upon my credentials in this regard.

I have done reading, and have recently read, with respect to that. I commend to your attention the writings of Professor Berger of Harvard, former counsel of this committee, Paul Fenton, and Professor Fenton has written on the subject.

Suffice it to say, it is my understanding, the phrase "high crimes and misdemeanors" comes from the historical English practice. The precise meaning, however, as intended by those who adopted that historic phrase into our Constitution has been the subject of continuing debate.

Were the facts otherwise in this case, perhaps this committee, by its action, could make law and clarify the phrase, but I don't think it should undertake to do so gratuitously in this case, when it is not required.

My conclusion is that the term "high crime" required criminal conduct, that the term "misdemeanor" is modified by the word "high" and means "high misdemeanor" and means serious misconduct, not necessary criminal, especially in the context of a judicial impeachment.

I think, however, that a different interpretation may be required in the case of a nonjudicial officer.

Mr. DEWINE. Thank you very much.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I join my colleages in expressing appreciation to the Judge for his appearance. I have no questions.

Mr. SENSENBRENNER. No questions, Mr. Chairman.

Mr. KASTENMEIER. Mr. Hughes.

HUGHES. Thank you, Mr. Chairman. No questions.

Mr. KASTENMEIER. I would like to join my colleagues in expressing appreciation for your testimony.

One comment I do need to make with reference to your earlier admonition that in fact, the Congress should not defer to any other branch, in terms of making an independent judgment, and that is certainly true in this case as well.

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However, it is also observed that the Federal judiciary has evolved over a period of years, not very large in numbers relatively speaking, Congress cannot necessarily follow each possibly serious case involving a Federal judge, and therefore, an alternative of advice from the judicial conference on such matters is welcome, although not determinative, of course, with respect to the serious matters that may arise, not necessarily referring to this case in point, but others elsewhere in the country and any one point in time.

It is clear that we do not often exercise this authority, and as the gentleman well knows, it is extremely difficult for the Congress to do so in the long term on a frequent basis.

While I think the point is correctly made by Judge Wiggins, that we cannot and must not abdicate responsibility for initiating impeachment proceedings, nonetheless, I think a procedure such as is extant in the Judicial Conduct and Disability Act is useful to us.

Judge WIGGINS. Mr. Chairman, before I leave, I consider it to be an important part of my presence here to dispel any misunderstanding that might exist between this committee and the conduct of the ninth circuit council.

It has been expressed to me by a number of persons, that members of this committee have judged the ninth circuit council harshly by reason of the conduct in this case.

The act which he is largely responsible for is a very useful enactment, given routine charges that may be made by a party, or a lawyer against the conduct of a judge.

It frees up the Congress of the United States from the burden of the difficult chore of investigating such charges that are too serious to be overlooked.

However, my comments are addressed to this case. This case, on its face, is one in which the remedy lies with Congress. The fact of conviction of Federal judge is not the kind of case that warrants the quiet but objective consideration of a civil complaint by the judiciary.

This is one in which Congress must act, if it is going to act at all, and there was no reason for Congress to defer or to view harshly the circuit council on the facts of this case.

Mr. FRANK. Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. FRANK. If I might briefly, because I may have misunderstood something the Judge has said. It is helpful if I can just clarify it, because I thought he was saying something I disagreed with, but now he is not. On page 3, you say, this is a case in which the House should exercise its independent and sole power of impeachment, and not defer, even pro forma, to any other branch.

I take it you mean with regard to the actual decision whether or not to impeach. This does not mean that we would be under any obligation to retry the case. You don't mean to rule out, or accepting the fact of the case in the conviction, that would not be an improper deferral?

Judge WIGGINS. Congressman, what I was trying to address was the problem that I had heard; namely, that this committee felt it should not proceed absent some prior determination by the circuit council and the Judicial Conference of the United States.

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Mr. FRANK. That became clear. In other places where this has been discussed, there has been some suggestion that we ought, in effect, independently retry the case, and that we ought not—and some people have used phraseology like yours, and you have clarified it. That is not what you mean.

Judge WIGGINS. The Congressman is correct.

Mr. SENSENBRENNER. Mr. Chairman? I was a member of the committee when the act in question was approved, and I recall voting against it on constitutional principles, but it seems to me that the major argument that was in favor of passing the Judicial Tenure and Disability Act was to allow the judicial branch of Government to make factual and evidentiary determinations, thereby freeing the Congress up from getting involved in evidentiary brouhahas which are associated with cases of alleged judicial misconduct.

My first question is, is that your interpretation of it; and second, do you believe that there are no factual questions that remain to be determined as a result of Judge Claiborne's conviction, and all of the direct appeals being exhausted?

Judge WIGGINS. I will answer the second question first.

I think it is unnecessary for this committee in this case to engage in any fact determinations. I believe the facts have been found, and found under a procedure which afforded the respondent full due process rights.

The facts were found to be true beyond a reasonable doubt. We have something in the nature of collateral estoppel in these proceedings, that the Judge should be estopped from disputing the truth of those facts in this case.

The former question, the question about the act being intended to permit fact-finding at the judiciary level, thereby freeing up a responsibility to do so by the Congress, I was not present here while that bill was passed.

I was present here while it was being considered, but not adopted. I have read some of the legislative history, particularly that offered by my own Chief Judge Browning.

I must confess that I don't share his views I don't share the notion that the act was intended to relieve in any way the separate responsibility of the Congress to determine whatever must be determined when impeachment is warranted.

Nevertheless, that legislative history exists. I think there are profound separation of powers questions involved, if this committee understands its enactment to mean that the power of impeachment in any way is shifted to the judicial branch, because I don't believe it can be done consistent with Article I, wherein it states that sole power of impeachment rests with the Congress.

Mr. KASTENMEIER. I don't think anyone suggests that the power of impeachment has shifted to the judiciary, but it was contemplated in that act, which I understand passed the House unanimously, in serious cases in which the judiciary could not, I am talking about circuit councils, impose a discipline or seek a remedy of the case, that it would move that issue, in that case, to the judicial conference, which if it saw that it did not have power, to have a remedy in this case, and if the Congress were not aware of the situation, it would then nominate the matter to the Congress, not in any sense of fulfilling anything other than a notice, and not a

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notice that I suppose technically binds the Congress to anything whatsoever, but puts the Congress on notice, that there is a serious problem, may or may not involve an impeachable offense which it may want to take a look at. That is really the way the act was written.

Now, whether people can find constitutional problems with that, I do not know. I suppose it is possible.

Judge WIGGINS. I am not finding that. It is not for me to declare it unconstitutional from this position, and I won't presume to make that judgment.

If you look at the other side of the coin, you may have some problems. One side of the coin says, the judicial branch will look at the facts and transmit to the Congress a certificate that grounds for impeachment may exist.

The other side of the coin is the judicial branch looks at the facts and does not make such transmission because it determines that no grounds for impeachment exist.

Now, does that bind the Congress? Of course, it does not, except that it is a practical fact which will make it very difficult for the Congress to act in that situation, and you are yielding in a sense considerable authority, perhaps more than you would want to yield, to the judiciary.

We are talking about the merits of a piece of legislation that is now law, and I am gratuitously making that observation for the benefit of the chairman.

Mr. KASTENMEIER. As I say, I think the Congress has to be informed in any event in some respect, whether it is in such notice, or whether it is reading it in the newspaper. Whether reading it in the newspaper is more reliable, I cannot say, but obviously, one way or another, we will need to be informed and to the extent that this is an alternative and supplementary device useful in these years, perhaps not necessary in the past, I would submit that short of constitutional infirmities, Congress has made a policy.

Mr. FISH. Would the chairman yield?

Judge Wiggins, whether or not there is a transmission to the Congress, I understand your position is that Article I means what it says, and the House of Representatives shall have the sole power of impeachment, which is a power that cannot be shared with any other branch of the Government?

Judge WIGGINS. Exactly right.

Mr. KASTENMEIER. Of course, no one disputes that.

Judge WIGGINS. Be assured, I think that the legislation is excellent and is needed. I am only pointing up some troubles around the edges that may not be involved in this case.

If the committee wishes to hold some oversight on this legislation, it has served some useful function to dispel many of the minor complaints about which you have never heard, complaints with respect to judges, that would have festered before this committee, had the legislation not been in existence.

Mr. KASTENMEIER. Its constitutionality has been upheld in the eleventh circuit. I don't think the Supreme Court has ruled on it. In any event, we have reached the noon hour, and we thank our colleague.

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We still call him our colleague from California. We thank him for his testimony and his advice today.

I would propose to the committee that we recess until the hour of 2:30 p.m., which will give Judge Claiborne and his counsel adequate time and the rest of us adequate time to have lunch and attend to other legislative duties, so the committee will stand in recess until 2:30 p.m.

[Whereupon, at 12:55 p.m., the subcommittee recessed, to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

Mr. KASTENMEIER. The committee will come to order for its afternoon session.

We are still in executive session as we were when we concluded this noon. We have before us Mr. Oscar Goodman. Mr. Goodman, do I understand that the respondent does not choose to appear this afternoon in person?

TESTIMONY OF OSCAR GOODMAN, ESQ., GOODMAN, TERRY, STEIN & QUINTANA

Mr. GOODMAN. Mr. Chairman, that is correct. Judge Claiborne was afforded an invitation to these proceedings, and he accepted the same, and he was transported from the facility from Maxwell Field, AL to Washington, DC, leaving Maxwell Field apparently as late as 3:30 last night and the rigors of the travel are such that he believes that it is in his best interest to return to the facility. He has been addressed by your staff and has been told very explicitly that he has the opportunity to be present during the remainder of these proceedings.

In fact, these proceedings may go outside the scope of the inquiry and notwithstanding being advised of the same, he has taken it upon himself to go back to the institution.

Mr. KASTENMEIER. Then does he, in fact, waive the right to appear?

Mr. GOODMAN. Yes, sir.

Mr. KASTENMEIER. First of all, it is true that this committee does have an announced scope, and it is my understanding that you, as counsel, desire to go beyond that scope for the purpose of, I guess it would be in your view, telling the whole story. Is that the basis on which you will testify before us this afternoon?

Mr. GOODMAN. With your permission, Mr. Chairman, I don't believe within the time constraints that I would be able to tell the whole story, but in order to relate a meaningful history and chronology to this subcommittee, it would be necessary for me to give a background which would go outside the scope of the letter which we received.

Mr. KASTENMEIER. Are you authorized to speak on Judge Claiborne's behalf?

Mr. GOODMAN. I am.

Mr. MAZZOLI. Mr. Chairman.

Mr. KASTENMEIER. First the gentleman from Kentucky.

Mr. MAZZOLI. Thank you. I will certainly go along with whatever the chairman decides to do, but I want the record to show I dis-

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agree with the decision, if it is to give the gentleman the opportunity to make that background statement. I think that what this committee has before it is a simple task, and I think the simple task is, did the judge have a fair trial, did he have an opportunity to be heard, did he have counsel, did he have a chance to appeal, were the appellees heard and rejected, and is he now in jail?

I think it is a fairly simple situation that we have, and I think that to go beyond that very narrow—which the gentleman, our chairman, the gentleman from Wisconsin, clearly conveyed to Judge Claiborne, to his attorneys and, therefore, they were prepared for that kind of an inquiry, it seems to be unnecessary.

But, again, if the chairman feels like it is necessary to make that step, I won't make any official protest, but I don't think it is a decision which has to be made.

Mr. FRANK. Mr. Chairman.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. FRANK. I move the witness be given 2 hours in which to make such presentation without prejudice to the subcommittee's decision as to the proper scope of this inquiry. If I may speak briefly, I think many of us share the views of our friend and colleague from Kentucky as to what the appropriate scope of our decision-making should be, but given that the witness, on behalf of Mr. Claiborne, has expressed an interest in going beyond that, I believe that in the interest of the broadest procedural latitude, we ought to do that. I think we should make clear we don't mean by this to set any precedent as to what is or is not relevant. The subcommittee took a decision under your leadership.

I don't think in allowing the witness whatever latitude he wishes to take we ought to in any way be interpreted as going back on our decision.

Mr. SENSENBRENNER. Does the 2-hour time limit include the time for questions by members of the committee?

Mr. FRANK. Yes; it does.

Mr. SENSENBRENNER. Thank you.

Mr. MOORHEAD. Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California.

Mr. MOORHEAD. I would be interested in knowing how long the witness feels it would be necessary to make an adequate presentation in the case, if I could have that information.

Mr. GOODMAN. May I answer?

Mr. KASTENMEIER. Yes; of course.

Mr. GOODMAN. If I were to go through each and every detailed allegation which we have made to support our position of Government misconduct and prosecutorial abuse, it could conceivably take 2 days.

Mr. KASTENMEIER. What is the minimum time required, I think the gentleman——

Mr. GOODMAN. I am going to try to do it within the 2 hours.

Mr. MOORHEAD. Do you feel the committee is treating you fairly if you have 2 hours to make the presentation?

Mr. GOODMAN. I think if the committee has before it the record of the proceedings in court——

Mr. MOORHEAD. Which we do.

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Mr. GOODMAN. Including our latest filing, which has not yet been ruled upon, which is called the motion to vacate judgment and sentence for evidentiary hearings and for discovery proceedings which were filed in the U.S. District Court in the District of Nevada, and you make yourselves familiar with these particular pleadings, then I am being treated fairly.

Mr. MOORHEAD. If we do not have that, would you offer that?

Mr. KASTENMEIER. The chair is informed we do have that. We have a copy of that.

Mr. GOODMAN. Very good. That is our latest——

Mr. FRANK. If the gentleman would yield, let me say, as in any case, I believe the 2-hour rule, in conjunction with the documents, be more than adequate, but if we should decide some line of inquiry needs to be pursued, we ought to have the option of extending, although I anticipate that.

Mr. MOORHEAD. Under the conditions the witness feels it would be adequate to make that presentation, I will support the motion. But I am very interested that this be considered a fair hearing and that he does have adequate time to make his statement.

Mr. KASTENMEIER. I am ready to put the question, then. The question is on the motion of the gentleman from Massachusetts. All in favor say "aye"; all opposed, "no." The "ayes" have it. We will proceed on that basis. I will further say to the witness that failure on examination, or on questions and answers to address any particular aspect of your presentation does not constitute agreement with it or accession to that which is said, because I don't think we will be necessarily able to cover all aspects. That I think is understood.

Therefore, at this point, Mr. Goodman, you have the rules of the House and the rules of the committee at the witness table, and I will ask you to proceed under oath as all other witnesses have.

[Witness sworn.]

Mr. KASTENMEIER. Please be seated, and it is now 3 o'clock. You may proceed. We will presume to conclude this around 5 p.m.

Mr. GOODMAN. Thank you. Mr. Chairman, members of the subcommittee. This is a strange procedure for me because I have never appeared before such an august body at one time, and I want you all to know that I, when we received the invitation to attend these proceedings, we were honored, and we were pleased with the opportunity to be invited here to present our position, even within the limited context that the letter set forth, limiting it to a discussion of the two tax counts of which Judge Clairborne was found guilty.

We believed at that time, though, that it really would be unfair to this subcommittee for you to proceed against Judge Claiborne based on the mere fact that he was found guilty, because this case, at least in our opinion, has been different than any other case that either Judge Claiborne in his many many years as a trial attorney and a judge, and myself in over 20 years of practicing law, have been exposed to.

We have made serious allegations along the way, the allegations were those that Judge Claiborne, as a trial lawyer in Nevada, who specialized in the defense of persons accused of crime, developed a reputation of a fighter, of a maverick, and along the way made enemies. I am sure many of you can appreciate that being in politics,

that there are two sides to every question, two sides to each issue, and Judge Claiborne, as a criminal defense attorney, was representing people who were unpopular in the State of Nevada.

One of his last offenses before he went on the bench was representing a child molester who was ugly in stature, who was hated by the entire community, who was in the newspaper every day, and Judge Claiborne went forward and defended him as vigorously as he knew how.

When the FBI began to investigate Judge Claiborne, the trial judge who handled that case indicated Judge Claiborne had made misrepresentations to the trial court in obtaining bail after this child molester had been incarcerated.

From that point on, there seemed to have been a trail by the Federal authorities concerning Judge Claiborne and Judge Claiborne's supposed fitness to become a Federal judge because he represented people who were unpopular, and he fought tooth and nail with governmental authorities.

He did become a Federal judge, in September 1978, and as a Federal judge, and this is important to know, he was respected by members of both the prosecution as well as the defense, as well as the citizens of this country, who stood before him charged as criminals, because Judge Claiborne gave all sides a fair trial, and then it came time for sentencing, he was a stern sentencer and members of the prosecution who appeared in front of him in the years took the position uniformly that Judge Claiborne was a prosecution-minded judge, a fair judge, the kind of judge who should be sitting on the bench.

That was the general attitude on the part of the U.S. Attorney's Office in Las Vegas, NV. In 1980, an FBI Agent came to Las Vegas by the name of Joe Yablonsky.

Joe Yablonsky came to Nevada with a mission, and sometimes truth is stranger than fiction. Joe Yablonsky, when he came to Nevada, indicated that he was going to get Judge Claiborne's head on a silver platter, and he was going to get other people, too.

And believe it or not, there were political hit squads, as strange as it may seem, set up between Yablonsky representing the FBI and an overzealous sheriff and his adjuncts, where they targeted people in the Las Vegas community.

And the primary target——

Mr. MAZZOLI. Mr. Chairman, may I ask a question? It looks like we are going to have a vote here. Let me just ask the question——

Mr. KASTENMEIER. The gentleman from Kentucky.

Mr. MAZZOLI. When a representative of the Government testified, he referred constantly to book, page, and verse, document data, page references, document numbers, in order to set the background. At this point, the gentleman who is at the witness table today speaking of people who are going to get somebody's head and out to get them, and political hit squads, I mean, would the gentleman from Wisconsin suggest that the gentleman who is our witness today document, at least made reference to factual data, or do we have a tale spun today which might have editorial comment, might have personal communications woven into it?

Mr. GOODMAN. If I may respond?

Mr. KASTENMEIER. Yes; would you respond?

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Mr. GOODMAN. Congressman Mazzoli, these allegations have been made and are part of the court record. They are allegations which we made in our motion to dismiss.

Mr. MAZZOLI. You refer to them then? This political hit squad, where does that come from, where does Yablonsky, about handing somebody his head, is that in the record?

Mr. GOODMAN. It is in the record under our motion to dismiss for prosecutorial misconduct.

Mr. MAZZOLI. The fact appears in a brief—I don't want to make a point of it, Mr. Chairman, but it seems to me they are operating at two different wavelengths.

If we ask the U.S. attorney to document and make a presentation, we are entitled to a factual presentation. What appears in the brief could very well be your own comment, not so much data.

The gentleman from Ohio.

Mr. DEWINE. My question would be to follow up on his question, is there testimony to this effect?

Mr. GOODMAN. It is my recollection, Mr. DeWine, Joe Conforte when he testified during the first trial, indicates that there was some discussion with Yablonsky, indicating that Judge Claiborne's head would be on a platter.

Mr. DEWINE. Whose testimony?

Mr. MAZZOLI. Conforte's stuff isn't even before us.

Mr. FRANK. Would the gentleman yield? I would hope within the 2 hours we might get questions toward the end. I wonder if we might do what we often do in cases like this, which is to note we would extend to anyone mentioned adversely in this testimony an opportunity to respond as part of the record.

That might be an appropriate way for us to proceed. I think it is often done in other situations, and that might alleviate some of the concerns if anyone is adversely mentioned.

Mr. MAZZOLI. Just 1 second, and I will yield to my friend from Wisconsin. The point is not to worry about Joe Conforte's reputation or Joe Yablonsky's reputation. My point is to say we are operating on two different sets of rules, one for the U.S. attorney and one for you.

I think we are having editorial comments, biases, that I am not sure appeared in the early record.

Mr. SENSENBRENNER. I think your point is absolutely correct. We are seeing the danger of opening this up beyond the scope announced. If there are statements that need to be rebutted by those whose reputation might be defamed by what Mr. Goodman is telling the committee, this will further drag on these proceedings and we will have an endless query into all kinds of issues completely unrelated to Judge Claiborne's fitness to continue serving on the bench.

Mr. FRANK. I said first, we did adopt a motion which said the witness could proceed the way he thought appropriate. Second, I suggested leaving the record open, not because I think those things would be relevant to our consideration, but in case anyone was worried about a record which made some unfair allegations.

I don't think leaving the record open in that case would necessitate any delay in our decisionmaking.

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Mr. KASTENMEIER. The Chair would make two comments. We are, and this is one of the purposes of being in executive session. This is an embargoed record at this point.

Two, I would like the witness with respect to attempting to document or ascertain a source in a record—not precisely—I realize you do not have the page numbers or anything of this sort.

But when you give a characterization involving an individual, if you will at least cite from what proceeding and whether such a matter or allegation was made public or put on a record, that would be helpful to the committee to ascertain that this is not something new or whether this is just conjuncture or characterization by you as a person.

Mr. MAZZOLI. I think my friend from Ohio put his finger on it, it ought just be in your brief, but should have testimony that had a chance to be impaired at time of trial, not because you have heard these things, and they wind up in your brief.

Mr. KASTENMEIER. We have a live quorum. The Chair intends for us to continue since it is only a quorum call. Members of course can excuse themselves and answer the quorum call if they elect.

In my case, I do not intend to answer this quorum call. We will have a vote perhaps in 30 minutes or 40 minutes. It is with that in mind that we will——

Mr. FRANK. That will not come out of his time, the time for voting. I would interpret the motion when we recess to vote that will not come out of the time for the witness.

Mr. KASTENMEIER. I think in all fairness, that would be the case. We expect that to be a 15-minute process. We will not recess, however, during this quorum call.

Mr. Goodman.

Mr. GOODMAN. Thank you, Mr. Chairman.

In an attempt to satisfy the request that the matters be documented about which I am addressing, the first documented act that we believe constitutes governmental misconduct concerns the prosecution of one Eddie LaRue. Eddie LaRue was a private detective who worked in Las Vegas, NV, and had been a private detective for some 25 years, and he had done work for Judge Claiborne when he was a private practitioner in Las Vegas, NV.

In 1980, Eddie LaRue became the target of an FBI investigation. Now this is documented in an affidavit of Eddie LaRue dated May 2, 1980, attached to the motion to vacate the judgment and sentence to which I have made reference. And Mr. LaRue was charged with certain offenses involving illegal wiretapping.

But, prior to that, the investigation into Mr. LaRue concerned itself with the fact that the Federal grand jury was investigating him for doing illegal wiretapping for Judge Claiborne when Judge Claiborne was a private practitioner of whom somebody Judge Claiborne was associated.

Mr. LaRue said that was not the fact; that was never the case; he never engaged in illegal bugging activities, and certainly no illegal bugging activities on behalf of Judge Claiborne.

The Public Integrity Section of the Department of Justice, the same division that prosecuted Judge Claiborne, came out to conduct the prosecution of Eddie LaRue, just a little private citizen in Las Vegas, NV, and they prosecuted him for the wiretap.

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During the negotiations, which usually take place at the trial level, right before the trial was to commence, Mr. LaRue was approached by representatives of the Public Integrity Section, and they said to him, "Mr. LaRue, you are looking at getting 25 years if you are found guilty. If you will tell us that Judge Claiborne had you perform illegal wiretaps for him, everything will be dropped." And LaRue said, "I can't do that because it is not true."

Nonetheless, they continued with the prosecution; and, fortunately for LaRue, he was acquitted.

The second victim who came along as a result of the vendetta against Judge Claiborne is a Las Vegas—or a former Las Vegas Metropolitan Police detective by the name of Chuck Lee. Chuck Lee is now presently working for the Clark County district attorney's office, and Chuck Lee provided us with an affidavit, which is also contained in the motion to vacate judgment and sentence.

Chuck Lee was assigned, while Judge Claiborne was a private practitioner, to conduct a lie detector test of Judge Claiborne to find out whether or not Judge Claiborne did in fact engage in illegal wiretapping, and worked with Eddie LaRue in order to conduct illegal wiretapping in that particular situation.

Lee made his findings. He ran his polygraph. His polygraph indicated Judge Claiborne, then Mr. Claiborne, was in no way involved in any type of illegal bugging. After that, he was demoted from the rank of detective to a mundane telephone answerer.

He ultimately lost his job. He has filed a freedom of information suit. Out of some 1,239 pages which have been provided to him, 457 pages suggest that he was the subject of an FBI surveillance as a result of his involvement with Judge Claiborne.

His financial records were rummaged through, and he, too, became a victim regarding the investigation, which surrounds Judge Claiborne. And those matters, as I indicated, are all contained in his affidavit, which is dated April 28, 1986.

The next victim was Gerald Swanson. Gerald Swanson was the District Director of the IRS, situated up in Reno, NV. Gerald Swanson was approached by representatives of the FBI to reduce Joe Conforte's tax liability from approximately some $19 million down to $3.5 million. This is documented in Mr. Swanson's affidavit, I believe.

I am sorry. I don't have it with particularity. But this was brought out, and is made part of the record—that he was then targeted as a "sting" in an attempt to bribe him; that the bribe did not go through.

As a result of his being cooperative, as far as Judge Claiborne was concerned, he was demoted. He was sent out of Las Vegas from his position as District Director. He now is a tax collector, as I understand it, in Dallas, TX. And, once again, he has been punished because he refused to approve an investigation of Harry E. Claiborne on the basis of Joe Conforte's word, and a word which he has described is the word of a three-time felon.

We then get to Joe Conforte. Notwithstanding the fact that the Conforte counts were not presented to the jury during the second trial, the Conforte technique pervades the entire atmosphere of the prosecution of Judge Claiborne, both in the first trial as well as in the second trial.

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Joe Conforte, very briefly, was the owner of a house of prostitution in Washoe County, which is outside of Reno. Joe Conforte owed approximately $20 million in civil tax liability to the United States. Joe Conforte was convicted of failing to file proper taxes. He received a 20-year sentence, which was subsequently appealed to the ninth circuit. That sentence was then cut back to 5 years, and Joe Conforte was advised that he was going to be resentenced.

Joe Conforte fled the country. Joe Conforte went to Rio de Janeiro. Joe Conforte was then located—and this is all part of the record as far as our motion to dismiss on prosecutorial misconduct—he was located by representatives of Mr. Yablonsky. They went down there. They cut a deal with him.

Mr. Shaw, the prosecutor who handled the grand jury proceedings and was a lead prosecutor, chased Conforte around all over the world—at least three different meetings with them. Shaw met with Conforte—during Shaw's honeymoon, actually—and they cut a deal which I submit was unconscionable and violated the law in so cutting the deal.

The following took place: There was an agreement that Conforte would receive, instead of the 5-year sentence, which could have been imposed upon him, a lesser sentence; and it was impossible that the lesser sentence could be imposed because the judge who had sentenced Conforte had already denied a motion for reduction of sentence.

The law is clear; it is crystal clear: You have only 120 days within which to apply for reduction of sentence, because Conforte was a fugitive. That time period elapsed. Nevertheless, special arrangements were made to bring Conforte from out of the country into Miami.

Immediately before he testified before the grand jury, which ultimately indicted Judge Claiborne, after two grand juries did not bring an indictment against him, they brought him into the United States, up to Washington, DC, in front of a judge, and had the judge sentence him to a 15-month sentence beyond the scope of the jurisdiction of the court.

Even Judge Hoffman, who was not a friend of ours during trial proceedings, took the position he questioned the legality of that.

In addition, Joe Conforte was facing a habitual criminal charge, which would have subjected him to a life sentence, which was reduced down to a term of 18 months, to run concurrent when he was in the witness security program.

In addition, arrangements were made to have his tax liability liberalized and Joe Conforte was permitted to testify before the grand jury.

There were three grand juries that considered the Claiborne matter, two of which were up in Portland, neither of which returned an indictment. There was an indictment returned in early December of Judge Claiborne, and then the statute of limitations——

Mr. KASTENMEIER. Up in Portland, did you say?

Mr. GOODMAN. The indictment was returned in Reno, after two Portland grand juries did not return an indictment. It is not clear whether or not the Portland grand jury were ever asked to return an indictment or were being used to gather information, but it is

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crystal clear that Joe Conforte only appeared in front of the Nevada grand jury, and I believe his appearance was the day before the indictment was returned, December 8, 1983.

Joe Conforte made his allegations in return for an invitation of perjury. We take the position that when offered as much as he had been offered, he would say whatever he had to say about the judge.

Now, one of the problems we have is that the prosecutor, during the grand jury proceedings, and this can be found in Joe Conforte's grand jury proceeding which should be part of the record, 113 pages of those proceedings, not once did the prosecutor ask Conforte on what day did this alleged bribe take place, and the reason for that is because the bribe that Conforte was talking about could only fit in with the time period which was inconsistent with the truth, and the prosecution knew that, because as it ultimately turned out, when we were going to trial, the prosecution was trying to pin us down as to Judge Claiborne's whereabouts on a motion for alibi three separate times, because each time they came with a particular time that this bribe supposedly took place, Judge Claiborne some years later, in reconstructing where he was on a particular occasion, was able to reconstruct it in such a manner that it was impossible for the Conforte story to be acceptable.

And three separate times that came back to us, and three separate times we had to go deep into our pocket to come up with an alibi in the best sense of the word, the whereabouts of the judge when Conforte was telling them when this bribe took place.

The physical evidence, this is all part of the trial transcript, the examination of Agent Wicks, the FBI agent, the examination of the landlady who owned the apartment that Conforte allegedly said this bribe took place, it is clear that the bribe could have never taken place there from all the physical evidence, because of the physical scene as described by Conforte being completely contrasted to the physical manner in which the apartment was situated.

Then there was a question as to where the money came from. Conforte testified that he got the money out of a particular locked box at a bank, and when pressed on that, the records at the bank did not reflect accurately with Conforte's testimony, and through very, very hard work, we were able to bring in a gentleman from the State Department who testified under oath, that at the time that Conforte was supposedly engaging in all the activity, getting the money to pay Judge Claiborne the bribe, Joe Conforte was in New York City getting a passport to leave the country.

The point of this is that if, in fact, the Government was going to use somebody like Conforte and offer him what they did, the least they owed to Judge Claiborne to prevent perjury would be to have checked out the facts before they brought Judge Claiborne to trial.

Now what happened after the trial concluded, the first trial—and this is important—the Government knew they were in trouble. A sampling of the jury, which was hung, reflected that on the bribery count it was 11 to 1 for not guilty. On the other counts, which go to the very integrity of judicial essence, the weight of the verdict, or the nonverdict by the jury, was weighed completely for acquittal. Even on the tax counts for which Judge Claiborne ultimately was convicted, it was split either 5 to 7 for the 1980 count, or 6 to 6, but never worse than that.

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What did the Government do? After they got their indictment using these means and these techniques—and I will go into a little further as far as how they treated Watson, the tax preparer from Creative Tax Services, or whatever it was called—after they get the indictment, what they do is, they file a motion, and one of the pleadings suggests that this was a motion that was unopposed. It is my recollection that I opposed it vigorously. It was a motion for leave to dimiss counts.

What the Government said in this motion, and this is a matter of record—the Government attorneys believe that the evidence on V, VI, and VII of the indictment in this case is clear and unambiguous, the 1979 and 1980, in the ethics account.

The presentations of evidence on counts I, II, III, and IV may have distracted the jury in its consideration of counts V, VI, and VII and contributed to its inability to reach a verdict on those counts.

Who created the distraction? The prosecution, notwithstanding the fact that the grand jury is supposed to be an independent entity—the prosecution fashions the presentation before the grand jury, and in this particular case this was the subject of our motion to dismiss, based on a violation of the use of grand jury agents, a virtually unprecedented practice was utilized, a practice which appears to be fairly unique in this kind of situation.

The grand jury swore in as agents representatives of the FBI and representatives of the Internal Revenue Service who were assigned to Mr. Shaw for purposes of assisting his investigation as agents of the grand jury. These gentlemen would go out to persons in the community and serve them with subpoenas, and this is all a matter of record, and it would be in the transcript of what took place before Judge Hoffman. And it is on that particular motion to which I address myself.

These gentleman would go out to persons in the community with a subpoena, and the subpoena would say, in lieu of a grand jury appearance, you can turn over this material to us; and representations were made to these folks in the community that, in fact, I am an agent of the grand jury, you can give me this, you don't have to come to the grand jury.

Then, these FBI agents and IRS agents got the material, hauled it in for weeks at a time, go through it themselves, make their analysis, and then report to the grand jury, after discussing it among themselves. They were doing the work of the grand jury and completely abrogated what we are used to.

Basically what was taking place is that they were working hand in hand with the prosecution in conducting their duties which are, according to all the laws that we know, supposed to be separate and apart.

Now that matter was raised on appeal, and it was addressed by an appellate court which was composed of three judges who were not members of the ninth circuit.

Judge Claiborne's case—and I can't tell you that this is a matter of prosecutorial misconduct because it has nothing to do with prosecutorial misconduct—but Judge Claiborne's case was treated differently than any other case in history. There was no reason why the ninth circuit couldn't have its own judges listen to Judge Clai-

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borne's appeal. Rather, they were judges from the second circuit, seventh circuit, and the tenth circuit, who decided the appeal.

And, as strange as it may seem—and I understand I am under oath, and if I misunderstood what these gentleman said during oral argument—but I belive that not one of those judges, from the way I understood their remarks to me, not one of the three judges who permitted us unprecedented time as far as argument—I argued for an hour and a half, and we are usually limited to a half-hour at the most—not one of those judges read the record at that time, and only one of those judges had read the briefs which were filed.

The other two judges were coming into the argument cold. They decided the case. We petitioned for a rehearing en banc, which was rejected very, very quickly.

After it is rejected, we get the sense—when it is too late—from judges in the ninth circuit, we got a dissent from Judge Reinhardt, who said these people should never have heard the case, and there is no reason why a judge out of the ninth circuit shouldn't have heard the case.

Judge Pregerson, Judge Ferguson—they cam forward with written opinions saying that these matters were too important and should have been handled by judges in the ninth circuit. It was too late for us to do anything.

The convictions in themselves, a very difficult burden for us to overcome, have a background to them. We then apply for relief, and recently we asked for a stay. We said, don't be in such a hurry to send the judge to jail, because we have a very serious motion which could be heard here, and it could be dispositive of the entire conviction because a piece of paper which we believe was the very predicate for the entire prosecution, we submitted, was taken as a result of an illegal search and seizure. We get rejected 2 to 1.

Judge Fletcher voted that there should be a stay. Judge Beezer and Judge Canby said no stay. Thereafter, when we go to the Supreme Court for a stay and were turned down, we get dissent from Judge Reinhardt again who says that the case is most unusual, is a most unusual one, in a number of respects.

This is for publication, filed January 30, 1986, *United States* v. *Claiborne*, 84-1294. And he gives the background of the entire case and talks in terms of all the allegations, the FBI misconduct allegations that we have made, and the very things I have spoken with you today about.

And in terms of Swanson's being demoted, Conforte's credibility, of Lee and LaRue, and of all these things that took place.

Then he talks in terms of the designation of the trial court and in terms of the Government abandoning the Conforte counts, and he says we shouldn't have been in such a hurry. These are important issues, and issues that should have been heard by judges in the ninth circuit, and they deserve our careful attention.

We get a decision from Judge Ferguson, Judge Pregerson, and Judge Kozinski, but they are all too late. The only forum we are left with, until we have a hearing on the 2255 motion, is before you gentleman.

The essence of the 2255 motion is based on an illegal break-in, the most serious of allegations that they could make, all part of this motion, and there are affidavits.

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It is our position that the FBI, in conjuction with a Las Vegas Metropolitan Police officer and two unsavory personages from the Las Vegas area, participated in a break-in, and into Judge Claiborne's home; that the break-in took place before the indictment was returned; and during the break-in, pictures were taken of what has been referred to as Judge Claiborne's personal financial diary. And it is within that diary, which reference was made this morning, these entries concerning the fees from his private practice after he went to the bench, were found.

That is the only place that those items were located, as far as Judge Claiborne's records were concerned. They were carefully described as to the source of the fee, where the monies were either deposited or cashed; and it is our position, based on the information which we have, that the FBI agent and one of these other citizens went into Judge Claiborne's house, and the FBI agents took a picture or pictures of this personal dairy.

We were very interested, when the subpoena was served upon Judge Claiborne as the matter was being investigated by the grand jury, when there was a specific request—and the subpoena is attached to this particular motion—there was a particular request for Judge Claiborne's personal financial diary, and that is item No. 12 on the subpoena. That language was unique, and we never could figure out why until just recently.

It came to our attention that these persons did, in fact, participate in the break-in. We have an affidavit of Lake W. Headley to the effect that he has had discussions with one Clifford Isbell, to the effect that Isbell participated in the break-in, and that Isbell had a relationship with Joseph Yablonsky, and met with him and shared secrets of information with Yablonsky and Kent Clifford, also a member of what I characterized before as a hit squad, and which is also the language that was utilized by Mr. Isbell.

We have an affidavit of a James Daniel Johnson, who is presently serving a 4-year sentence in the Southern Nevada Correctional Institute, who advised that he actually participated in this break-in, and that the background, as related by Headley, is in fact accurate.

We have not had our hearing on that, but if in fact we have a hearing on that and we are successful, and we prevail on the fourth amendment issue of an illegal break-in, and we are able to show that the indictment and the prosecution was predicated on this illegal evidence, I submit to you that the conviction will fall, and it would be a terrible shame to take action against Judge Claiborne based on a conviction which could very well, based on this affidavit, be an invalid conviction.

The procedures—and this is a part of our motion based on governmental misconduct—under that provision which talks in terms of the IRS standard procedures not being followed—the procedures apply to Judge Claiborne, as far as this investigation was concerned, as to his taxes, which you are primarily concerned about having bypassed the type of procedures which every other citizen would be entitled to.

When one has a problem—and this is the testimony which come before the court—when one has a problem with his tax returns, especially one which was prepared by Mr. Watson, because I am sure

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you have all had a chance to see that—if an IRS auditor come across that tax return, the first thing he is going to do is call the taxpayer and say, let's get together and discuss what this abomination is all about. It sure doesn't look like a tax return; it is done in pencils, arrows on the Schedule D. What were you trying to do here?

Instead, Judge Claiborne is indicted on it. And instead of being called for an audit—and the next procedure is referred to the Intelligence Division, and the conference between the taxpayer and the Intelligence Division—not in this case—and then referred to regional counsel, who notifies the taxpayer, and the taxpayer makes a request to have a conference. It is always granted.

Not in this case. And it is transferred from regional counsel to the Justice Department, and you are offered a preindictment conference. And by the time we got back to the preindictment conference, everything was—it was too late. It was a meaningless conference because the decisions already had been made.

It was our position, in addressing the 1979 and 1980 tax accounts, that Judge Claiborne's defense was a valid defense. He took the position that he advised his tax preparers in both instances of the income which he received from his private practice. Thereafter, he relied on the fact that he had made full disclosure. He relied on the tax preparer to prepare the return in a manner which was consistent with good tax preparation. The returns were then filed.

If, in fact, the jury accepted an instruction which was tendered, and given to them as to that particular set of facts, they would have found him not guilty. The jury, of course, came in with the guilty verdict. But that was the defense which was tendered by the judge.

We submit that because of what took place during the trial, the jury didn't have in front of it all of the information necessary to make a determination based on that defense, because of the way the trial was conducted.

Judge Claiborne, on his 1979 return, had reported to his tax preparer, Jay Wright, the fact that he had received some $41,073.93. This is, I believe, defendant's exhibit 1, which was a letter addressed by Judge Claiborne to Jay Wright, dated April 11, 1980, where Judge Claiborne stated:

> Enclosed is a check in the amount of $8,000, and with a W-2 form from the United States courts, as requested. Fees received during 1979 for practice before I became a Judge are $41,073.93. I also sold my airplane in April, received $11,000. I paid $11,000 for it. So there is no profit or loss.
>
> I don't have Nevada savings interest; thought I had given it to you. If not, I will get it.

Now, what took place is that letter was delivered to Jay Wright by Judy Ahlstrom, Judge Claiborne's secretary. That is corroborated in several different ways. Judy Ahlstrom testifies to it.

We have the W-2 being attached to the tax return, which was sent in on—the extension was made on April 11. We have a check in the amount of $8,000, dated April 11.

In the afternoon, Judge Claiborne came by with another check for $2,500, dated April 11. All of that corroborates that Judy Ahlstrom did, in fact, deliver that letter, which would have been the total obligation that Judge Claiborne had as far as advising his tax

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preparer of the amount of income which he received from his private practice.

Jay Wright, the tax preparer, had undergone cancer surgery, and from the witness stand he conceded that he did not have an independent recollection as to anything. He also advised that the Government agents had spent over 100 hours with him in preparation for his testimony. And, in the second trial, he indicated that they were together with him for some 7 or 8 hours before he got on the witness stand. And, notwithstanding the fact that he didn't have an independent recollection, he was permitted to testify based on virtually leading questions.

Jay Wright testified that at no time did he ever throw away or lose any clients' papers. That was his testimony during the second trial.

After the second trial was over, during our motion for new trial, for judgment of acquittal, Judge Hoffman disclosed to us that he had inadvertently——

Mr. MAZZOLI. Mr. Chairman, may I ask a question?

Is there anything at this point that you have been going into that has not been brought up at some level of appeal previously?

Mr. GOODMAN. At this point, I have to say I have not gone into anything that has not at least been a subject of a pleading. I have gone into matters which have not yet been resolved.

Mr. MAZZOLI. I am not asking that. I am asking: Have these matters that you have recited to this point in your testimony been part of the appeal process at some other levels?

Mr. GOODMAN. Pleadings have been filed which reflect this. However, one of the pleadings has not yet been heard.

Mr. KASTENMEIER. You may continue.

Mr. GOODMAN. When Judge Claiborne was in private practice, the record will reflect in his testimony, and also in Wright's testimony, Judge Claiborne was running a business. He had a secretary. He had a bookkeeper. He had associates. And he had a very formal, rigid way of receiving his fees and advising his accountant as to the nature of the fees which he was receiving.

They set up an elaborate procedure where the accountant would get the canceled check directly from the bank, given the check stubs, and everything would be delivered to the accountant, and they would be able to discuss exactly what the financial situation was.

The record will reflect that Mr. Wright said that there was a standing instruction, a standing instruction by Judge Claiborne, while he was in private practice over these 30 years that Mr. Wright was his bookkeeper, that if there is ever a question, resolve it in favor of the IRS.

Now, I know this is not the time for argument, but we are talking in terms of a year later when he is supposed to be the leopard who changed his spots completely, and I submit that that is illogical.

Mr. Wright also testified that Judge Claiborne never asked Wright to do anything improper, or ever asked him to do anything that was doubtful. Mr. Wright, in indicating that he had no idea as to what Judge Claiborne's income was from the outside practice, belies credulity as well, because one of Mr. Wright's clients was the

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very Annette Quintana who was sending these thousand-dollar checks on January 16, 1979, on February 12, March 9, April 12, and May 14, she was sending Judge Claiborne these checks for $1,000, which were the subject of the tax account and Wright was the accountant and knew full well these moneys were going to Judge Claiborne.

Judge Claiborne, once he became a judge, had no need to be involved in this rigid type of tax accounting approach. He had no staff that he had to pay. He was receiving moneys, getting his paycheck. In Las Vegas, and I think I have to put this within the context that it is understandable, the casinos there, in large part, serve the equivalency of a bank in the sense that they are open 24 hours a day. If you know somebody in the casino, you are able to negotiate checks. You are able to engage in cash transactions, and Judge Claiborne, on occasion, would walk over, and he would cash these checks.

Now the Government takes the position, and their argument was, as their expert testified, Mr. Dias, when there is the cashing of checks, that is a badge of fraud, because you are trying to create a nonrecord of the transaction.

Well, the trial record will reflect that the $44,000 some dollar refund check that Judge Claiborne received as a result of his refund from the 1980 taxes, Judge Claiborne walked over to one of these casinos with the IRS check, and he cashed that, too. Once again, if we are talking about badges of fraud, we have to be consistent. If it is suggested that he is trying to do something wrong and avoid his responsibility, it cuts, you have to look at both sides of the story.

Mr. Wright denied remembering that he received the letter of April 11 which was delivered by Judy Ahlstrom, and this is in Wright's testimony, in the second trial. He says he has no recollection of it. In the first trial, he indicated that he did have a recollection of it.

Whether he did or he didn't, the record would also suggest that Mr. Wright, just about the time that the tax returns were being thought of by him, was sending letters where he was advising financial institutions on behalf of Judge Claiborne, a matter of record, that Judge Claiborne received earnings from his private practice in the amount of $45,371.93, and three of those letters were written to three different financial institutions, while Judge Claiborne was trying to get a mortgage, the latest of which was written on May 22, 1980.

The testimony was unclear as to whether or not the tax return which reflects the 1979 income was signed before it was completed by Mr. Wright en banc or whether it was signed afterward. It could have been signed en banc, but he doesn't think so. He thinks that Judge Claiborne reviewed it, and that it was signed in Wright's presence, but nevertheless, the fact remains that there were disclosures at least from the record on two occasions by Judge Claiborne of his income which he received.

The letters which went to the mortgage company, as well as, and the Judy Ahlstrom letter. The 1980 return, this is a matter of record as well in the testimony of Mr. Watson, and the testimony of Judge Claiborne, the 1980 return was a return prepared by Jerry

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Watson. Jerry Watson held himself out as an expert in real estate, an expert in insurance, an expert in bookkeeping, and the record reflects that he said he had a CPA who was working with him from Arizona, and Judge Claiborne utilized his services.

Judge Claiborne testified that he had a discussion with Watson regarding the sale of some property that Judge Claiborne had, and by the way, that testimony would refute the allegation, or the suggestion, that Judge Claiborne was destitute during this period of time, because Judge Claiborne during this period of time sold a piece of property for which he received in excess of $600,000 so that inference that he is destitute doesn't wash under those circumstances, but Judge Claiborne liked Mr. Watson.

There is no rule, even though the prosecution argued there is some kind of an obligation between his taxpayer and his accountant, if you have been working with a man for 30 years, that you have to stay with him. Judge Claiborne went over to Watson and he utilized Watson's services.

Now, Judge Claiborne unequivocally, from the evidence in the case, disclosed to Watson that he had received for the year 1980 the sum of $88,500 from outside income generated as a result of his law practice before he went on the bench. This is referred to in the transcript, and there was an awful lot of litigation about it, a lot of inferences, that this was some after-created type of document, referred to as a yellow piece of paper.

When you read the transcript, it goes right through it. This yellow piece of paper has on it the fact that the judge received that kind of money, and the yellow piece of paper was turned over to Watson's office, and it was written on by Watson's associate, Travaglia, who was unavailable because she had cancer and was indisposed at the time of the trial, and she gives us an affidavit, so we have that in the record.

It is attached to the motion to vacate the judgment sentence. She provides us with an affidavit wherein she indicates that she was employed by Jerry Watson as an accountant, and during the course of her employment, she had the occasion to do some of the work on the judge's 1980 1040, and in the course of these duties, had occasion to review and consider documents, and one of the documents was six or seven pages on yellow legal paper, included interest on income, dividends, et cetera, and page 1 is attached; and we provided that to you, and in that item No. 2, income from private practice before appointment, written out, in 1978, and in 1978, payable and received in 1980 with an asterisk, $88,500.

She indicates that she placed the asterisk there in her affidavit, a full disclosure there. When you have an opportunity to review the tax return, which was filed for 1980, you will see that she is the one who makes the reference on Schedule D, where she talks in terms of the income from the judge's private practice being used as a setoff against the goodwill which she and Mr. Watson were talking about, could have constituted deduction on the tax return.

Now, nobody is suggesting, or at least I am not suggesting to anybody that any certified public accountant is going to approve what took place as far as the treatment of the $88,500, but it is our position that if, in fact, the judge had the right to rely on the person who was preparing his tax, made the full disclosure, it is then the

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taxpayer's obligation to do it correctly when the return is being filed, and the point we tried to make to the jury and to you gentlemen is the fact that there was full disclosure, and the evidence supports that, as far as the 1980 tax return is concerned.

Watson signed the return.

Mr. MAZZOLI. Mr. Chairman, let me ask a question at this point. I think if I heard the gentleman say correctly, that the evidence supports it, and apparently you made that pitch to the jury, and they didn't buy it. How do you say the evidence supports your position?

Mr. GOODMAN. Just because a jury doesn't buy something——

Mr. MAZZOLI. That is answer enough. Thank you.

Mr. GOODMAN. Well, Mr. Chairman?

Mr. MOORHEAD. Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California.

Mr. MOORHEAD. I have one question, too. You say that a person has a right to rely upon the tax preparer, you meant, but in this particular instance, it would appear that the judge had tried many of these tax evasion cases himself, and both as a lawyer when he was practicing law, and as a judge, had cases tried before him.

If somebody obviously has more expertise than the people that is preparing the return, how could a man of great intelligence, and experience rely upon someone that obviously didn't know what they were doing, and say, I am relying on that person?

Mr. GOODMAN. Mr. Moorhead, that is the argument that was advanced to the jury by the prosecution. They asked those very questions of the judge on cross-examination, and also made that argument to the jury.

The facts that come out when Judge Claiborne testifies, and the record reflects is that Judge Claiborne never prepared his own tax returns, had no particular expertise in any type of tax litigation, as far as a defense attorney. In each case that came before him as a judge, he would decide the case from what was presented to him in the courtroom. He was familiar with the rule of law which says that if you make full disclosure to somebody upon whom you can rely, then that is a valid defense. But as far as having any particular expertise, as far as taxes are concerned, when Mr. Hendricks addressed you this morning, he probably came as close to the judge's expertise in telling you that the judge admitted he knew the difference between capital gains and ordinary income but other than that, the record would not suggest that he had any particular ability as far as taxes were concerned.

In response, if I may, to the comment of Member Mazzoli——

Mr. MAZZOLI. Your response, again, I appreciate, the response is enough. You made the pitch to the jury. They didn't buy it and the Supreme Court didn't buy it. I don't think we should.

Mr. GOODMAN. Using the expression "pitch" was made to the first jury who hung up on the case. As I say, it is my recollection that the court was 6 to 6 there. All I can suggest is that every trial is distinct——

Mr. MAZZOLI. Don't talk about those first; those first counts are not before us. To refer to the hung jury is to distort the testimony.

Mr. GOODMAN. Mr. Chairman, when I was making——

Mr. KASTENMEIER. The witness, Mr. Goodman, may proceed.

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Mr. GOODMAN. Thank you.

The record should be clear, of course, that the second trial also addressed the counts which were in the first trial which were left remaining after the motion to dismiss by the Government was granted by the court. We tried the 1979 and 1980 tax counts in front of the first jury where they hung up, and then they convicted before the second jury

The judge advised us after the trial was over that the judge forgot, and before the jury, after the jury, of course, was dismissed and after the jury had reached its verdict, Judge Hoffman advised us, through his inadvertence he had an envelope which contained statements of Mr. Wright, among others, which were not made available to us, and which contained material which disclosed that in an interview that Mr. Wright had had, concerning his propensity to lose documents, an interview on February 10, 1983, that there were records misplaced or inadvertently destroyed during a move from one accounting office to another accounting office.

There was an interview of February 16, 1983, with the IRS and the FBI, indicating "Wright kept photocopies of customers' receipts, and these copies and journals prior to 1976 were thrown away when Mr. Wright moved into his office in August 1981."

That completely contradicts the testimony of Mr. Wright and Mrs. Wright, who said under no circumstances at any time was anything lost or ever thrown away.

I think with the remaining time I would be happy to answer any questions, because I know that the members of this subcommittee must have specific areas of inquiry.

Mr. KASTENMEIER. Fine, Mr. Goodman. I will yield now to special counsel, Mr. Cates.

Mr. CATES. Mr. Goodman, isn't it a fact, sir, that as the case was argued to the jury, both the prosecution as well as the defense put into bold issue whether or not Judge Claiborne was telling the truth?

Mr. GOODMAN. I would say that that had to be of primary importance, that is correct.

Mr. CATES. And it was, or it would be a reasonable conclusion for a fellow trying that case to believe at least at the end of that trial that jury did not believe the judge; isn't that fair, sir?

Mr. GOODMAN. That would be a reasonable conclusion.

Mr. CATES. Now, sir, you have talked about the concept of being able to rely on the preparer. Isn't it a fact, sir, that Judge Claiborne admitted seeing that 1980 tax return? He saw that, did he not?

Mr. GOODMAN. He saw the return. I don't know, Mr. Chairman—I will address the chair, please—whether or not I can expand on the yes-or-no answers at this time?

Mr. KASTENMEIER. I would say you may respond as fully as is necessary; that is to say, you may respond more than a yes or no answer, unless that particular person posing the question insists for the purpose of clarity on a yes or no answer, normally you can answer it as you best are able.

Mr. GOODMAN. I appreciate that.

If I may, Mr. Cates, then, with that admonition, in response to your first question, as far as whether or not the jury, the ultimate

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issue as to whether the jury believed the judge, where I answered in the affirmative, any reasonable person would say that that was the key issue. You gentlemen know it much better than I will ever know it, but we had the impression at least, and this is not on the record, that juries are not, or do not favor persons in public office. That persons in public office who go before a jury are usually held to a standard different than the average citizen, and I think that historically, we could all recognize that.

I can't remember the last person in that kind of position who had an easy way before a jury. That is all I am saying there.

As far as the—or your next question, did it address the IRS agents. What was your question?

Mr. CATES. With respect to that particular response, sir, isn't it a fact that the thing that the jury disbelieved was that he had written a letter that he said he had written on April 11?

Mr. GOODMAN. You can't say that fairly. That, of course, was the thrust of our defense

Mr. CATES. And wasn't that an argument that defense lawyers made that in order to believe the prosecution with respect to the 1979 tax return, those folks had to believe that both the judge and his secretary were committing perjury?

Mr. GOODMAN. Of course, that was our defense, but I don't think we can at this point in time try to figure out why the jury did what they did.

Mr. CATES. That was argued and postulated in that forum?

Mr. GOODMAN. Yes, as well as the fact that Wright wrote these three letters to the financial institutions with virtually the same figure on it and that was uncontroverted.

Mr. CATES. Your defense, as I understood it, as long as you furnished the preparer the correct information, that that was all that was required. Is that a relatively fair statement?

Mr. GOODMAN. I think the law goes beyond that. I think the law imposes upon the taxpayer an obligation, the position where he has to be able to reasonably rely upon the person who is preparing his taxes, yes, and that and full disclosure was our position, satisfied the taxpayer's obligation.

Mr. CATES. That 1980 return, it was undisputed in the record that Judge Claiborne saw and signed really after it had been completed?

Mr. GOODMAN. That is correct. The record varies as to how long he saw it and what kind of examination he made of it, but it does bear his signature and it was seen by him after it was completed.

Mr. CATES. All right. And he—much of that return is prepared in pencil, is it not?

Mr. GOODMAN. Incredibly, it is.

Mr. CATES. He paid $2,090 for that service, did he not?

Mr. GOODMAN. He paid what he was billed.

Mr. CATES. All right. And isn't it a fact, sir, that on the schedule D, where the argument is made that his fees are included, there is no identification of $88,500, is there?

Mr. GOODMAN. That is a fact.

Mr. CATES. The only thing that appears there is three figures, 250,000, 150,000, and then a net loss of 100,000; isn't that right, sir?

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Mr. GOODMAN. More than that appears on it, because arrows appear on it with directions, fill in here, and the like. It would appear that that particular page was not completed.

Mr. CATES. All right. But somebody, a judge reading that would know that a person looking at that Schedule D wouldn't have the slightest idea what it meant.

Mr. GOODMAN. A judge who carefully read that would not have signed the return, and that gets me to another defense, of course, which we had, and that was: A person cannot be convicted of this particular offense, if he did not have the necessary criminal intent, the wilfullness, the bad purpose, if he was negligent or grossly negligent, and I think we would all concede, if you sign a return like that you have to at least be grossly negligent, that that is a defense.

Mr. CATES. That form showed he had a $100,000 loss?

Mr. GOODMAN. If you want to interpret it that way. I think it is an impossible interpretation.

Mr. CATES. It had $100,000 and there were parentheses around it.

Mr. GOODMAN. That is correct.

Mr. CATES. In the spring he thought he was going to have to pay another $20,000?

Mr. GOODMAN. That is correct.

Mr. CATES. When he read that return, he thought he was going to get $20,000 back?

Mr. GOODMAN. Correct, when in fact, Mr. Cates, everyone was so wrong, that not only didn't he have to pay 20, not only didn't he get back 20, he got back 40-some, 46, and he went over and he cashed it at a casino.

Mr. CATES. I don't have anything further.

Mr. KASTENMEIER. The gentleman from New York, Mr. Fish.

The gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. Mr. Goodman, I was kind of intrigued by your statement, something to the effect that juries tend to be biased toward public officials who are in the bar, in the dock, that somehow they tend to expect more of these people or something. Is that essentially what you said?

Mr. GOODMAN. They treat them differently.

Mr. MAZZOLI. Let me quote a few things to you, and tell me if you agree.

> The plain meaning of these constitutional provisions, and several others, is that Federal judges must maintain the highest standards of conduct to preserve the independence of and respect for the judicial system.
>
> The American judicial system, perhaps the greatest in the world, is, nonetheless, a fragile and vulnerable vessel, and it has no army to defend it; it cannot raise its own moneys and it depends on the decency and impartiality and independence and integrity of a relatively select and small group of individuals.
>
> When a judge engages in criminal activities or conduct that casts doubt on his personal integrity, he or she raises questions that impact on citizen respect and confidence in the judicial branch of government.
>
> Our courts are only as strong and resilient as the citizenry's respect for them.

Do you agree or disagree?

Mr. GOODMAN. I agree in large part.

Mr. MAZZOLI. Those were the chairman's remarks that he read today. You disagree with the chairman on the standards of conduct for a Federal judge?

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Mr. GOODMAN. With all due respect, we are in America; and we have the right to disagree.

Mr. MAZZOLI. I just asked you the question. You disagree with him on the fundamental question of the role of a Federal judge?

Mr. GOODMAN. No, I said in large part I agree with that.

Mr. MAZZOLI. You disagree in some part?

Mr. GOODMAN. Somewhat in the tone of it.

Mr. MAZZOLI. The tone of voice I used or the tone of the words. It is very important, because what the chairman said to us today, to you and to the Senator and to the judge and so forth is that the judges ought to be looked at differently. The courts and juries have a right to look at the person, if he or she is a Congressman or Senator or a Federal judge.

Let me read one other thing to you, from the Code of Judicial Conduct, Canon No. 2:

> A judge should avoid impropriety and the appearance of impropriety in his activities. A judge should respect and comply with the law and conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> The commentary, public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety, and all appearance of same. He must expect to be the subject of constant public scrutiny; and therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so willingly or not.

Mr. GOODMAN. I agree in large part. I am thinking to myself while you read that to me, myself as a criminal defense lawyer representing unpopular people, I have to be like Caesar's wife too. If I do something wrong, they will be all over me.

Mr. MAZZOLI. I am asking you about a Federal judge who is paid by the taxpayer. Is there a higher standard of conduct?

Mr. GOODMAN. I agree.

Mr. MAZZOLI. Your statement here was not to that effect, so apparently you suggest that the judge has been put upon by a jury because they didn't like that he represented unpopular defendants or something of that nature?

Mr. GOODMAN. What I am saying, sir, is I believe that statement which the chairman prepared would best be properly applied, and I would agree with it wholeheartedly.

Mr. MAZZOLI. You didn't a moment ago wholeheartedly.

Mr. GOODMAN. I wasn't through, I am sorry. If it were limited to his conduct and his judicial capacity, then I agree 100 percent.

Mr. MAZZOLI. The chairman read this statement and he subscribed to it because he wrote it. Let me say this one thing. Are you an attorney at law?

Mr. GOODMAN. I am, sir.

Mr. MAZZOLI. Do you consider yourself a good attorney at law?

Mr. GOODMAN. I consider myself so.

Mr. MAZZOLI. You do consider yourself a good attorney at law. You command high fees.

Mr. GOODMAN. Not in this case.

Mr. MAZZOLI. You represented the judge at some stage of this affair.

Mr. GOODMAN. Not all stages.

Mr. MAZZOLI. You appeared for him in court?

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Mr. GOODMAN. I was responsible for all other aspects of the case but the tax portion of the case.

Mr. MAZZOLI. What are you testifying about? Why don't they have the attorney who represented the judge on the issues they nailed him for?

Mr. GOODMAN. I was invited to attend.

Mr. MAZZOLI. Thank you, sir.

Mr. KASTENMEIER. Mr. Moorhead.

Mr. MOORHEAD. One of the things that has been pointed out here in this argument is the judge on the Federal bench owes the responsibility to the people, beyond just staying out of jail. The people have to have respect and confidence in him; would you agree with that?

Mr. GOODMAN. I would agree with that, but at the same time the judge and I believe the cases speak in terms of this, the judge isn't God-like. I mean, he is human, he has human frailties, and when I was making my comments about Chairman Kastenmeier's remarks, I agree with everything that was said as far as his judicial function is concerned. But to have a standard that some people may—like one of the jurors—this may be the perfect example.

It is a matter of record, it was a matter which was handled on the first appeal. One of the jurors, I believe the name was either Varnum or Witten, I can still remember said they don't like the way the judge looks, and they feel that the judge wouldn't be telling the truth, that he is probably guilty because of the way he looks. If we are talking about that kind of standard, then we can't start picking our judges by the way they look or the way they walk. We can pick them and keep them if they have integrity, and I don't—and the integrity that I am referring to is judicial integrity.

There is nothing in this record as it presently stands which would reflect, at least in my opinion, on the judge's judicial integrity.

Mr. MOORHEAD. Many people of the country, we get letters and we hear from them, are outraged by the fact that there is a man in prison that is being paid by the people of the United States each and every day or each month a very handsome salary for being a judge and that he might go back to judging the same kind of cases that he is being punished for at the present time in jail.

Mr. GOODMAN. I understand. I have heard people take that position, I have read letters to the editor, but, at the same time, if you came to the Las Vegas community, where the judge was sitting, and where the standard of respect is probably best judged, the whole community, at least ostensibly, is rallying behind him. There are posters, there are billboards, there are buttons. I haven't had anything to do with it. He is being supported in that community because they know as a judge he was a very, very good judge.

Mr. MOORHEAD. But in this case, he had good counsel, is that correct, throughout the case? At least average or above?

Mr. GOODMAN. I cast aspersions easier on the FBI than my colleagues as counsel, but there were a lot of areas that I believe that the tax attorney could have gone into, one of which was left out completely over Judge Claiborne's urging, it is not a matter of record, it will be a matter of record, and that is that Watson—and

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this is encompassed—we have been advised Watson's grand jury transcript, Watson told Judge Claiborne when he was asked whether or not that return was treated properly, Watson told Judge Claiborne the name of the IRS agents Watson had gone to and confirmed the matter was treated properly on the return. When Judge Claiborne urged the tax attorney, Johnson, to examine Watson on this, the attorney refused to do it.

Mr. MOORHEAD. There are a lot of judgments you make in a trial.

Mr. GOODMAN. No question.

Mr. MOORHEAD. You can go one way or the other, and one might turn out right and the other wrong, but that doesn't mean you haven't had qualified counsel or haven't had a fair trial if you made the wrong judgment.

Mr. GOODMAN. That is correct. That is a tactical judgment. But that doesn't help us with the truth finding process.

Mr. MOORHEAD. This case has gone all the way to the Supreme Court on direct attack, is that correct?

Mr. GOODMAN. That is correct, sir.

Mr. MOORHEAD. The only attacks now are collateral attacks that are being made, and I understand the exclusionary rule is one of them that you are depending upon.

Mr. GOODMAN. Primarily that is the one that would—could upset the apple cart, so to speak.

Mr. MOORHEAD. Even if you got out of jail because of the exclusionary rule, these proceedings don't eliminate evidence because of the exclusionary rule. Good conduct, good behavior by a judge doesn't encompass relying upon the exclusionary rule to stay out of jail.

Mr. GOODMAN. No, I understand that. But when you have language from Judge Ferguson, in *U.S.* v. *Claiborne*, filed December 30, "Refusal of the court to hear this case en banc" is lamentable. When the prosecution withholds vital exculpatory information, justice is being denied.

Rehearing en banc is necessary to correct a substantial curtailment of a defendant's right to discover impeachment materials pursuant to the Jencks Act, 18 U.S.C. 3500, and *Brady* v. *Maryland*, and what he is talking about there is the impeachment material that we have where we could have appealed, right.

Mr. MOORHEAD. They didn't represent the majority on the case, obviously, or you would have gotten the case overturned. We get minorities all the time on Supreme Court decisions, on appellate court decisions, and they don't rule.

Mr. GOODMAN. They did not represent the majority, that is correct.

Mr. KASTENMEIER. The time of the gentleman has expired.

The gentleman from Massachusetts.

Mr. FRANK. I will complete my questioning very quickly. I am inferring from your last colloquy with Mr. Moorhead that you seem to be agreeing that we have before us a question of whether or not the judge did the acts. Even if it were held that a conviction might be sought out because of break into his house, if, in fact, there was still to be a finding by some appropriate body he had deliberately failed to pay income taxes, that would be grounds for impeachment. Is that accurate?

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Mr. GOODMAN. It depends on what basis.

Mr. FRANK. If we were convinced that a Federal judge deliberately underpaid his income taxes 2 years in a row, would that not be an independent ground for impeachment even if a conviction on that count was thrown out for some failure to comply with constitutional privilege?

Mr. GOODMAN. My answer to that would be after a full hearing, if you were convinced that he was not acting in good behavior.

Mr. FRANK. I will be more specific to that. The answer is yes, I gather.

Mr. GOODMAN. I am not sure, because the——

Mr. FRANK. You mean if we were to conclude, based on some proceeding, as a factual matter he deliberately underpaid his income tax, with intent to underpay, even if criminal conviction couldn't be obtained because of procedural violation, that wouldn't be grounds for impeachment?

Mr. GOODMAN. If you made a finding he was guilty of a high crime or misdemeanor.

Mr. FRANK. Like failure twice in a row to pay your income tax deliberately. If it were found he had deliberately schemed not to pay his income tax.

Mr. GOODMAN. If you had all the witnesses in front of you and made that determination and found——

Mr. FRANK. Wouldn't that be grounds for impeachment, a finding to that extent, if it met your standards? Which I doubt it would ever meet.

Mr. GOODMAN. As I read——

Mr. FRANK. I will withdraw the question. I am not going to get an answer to it.

Two years ago this happened. You say he told Wright it was $40,000 and Wright only put down $18,000, is that correct, that was——

Mr. GOODMAN. No, I said he told Wright it was $46,000.

Mr. FRANK. Wright only put down 18,000?

Mr. GOODMAN. $22,000.

Mr. FRANK. What happened, did he get a refund for that year?

Mr. GOODMAN. I don't know the answer to the question.

Mr. FRANK. I am skeptical, if he had told the guy—his judicial salary was $54,000—and so he had expected, according to what you tell us, he told him he made $150,000, his accountant said he made $47,000. His accountant, according to you, inadvertently or somehow said he only made $70,000, and he got back presumably something or had to pay much less, and he didn't react to that? Doesn't that seem strange to you?

In other words, he was taxed on only 70 percent of what he knew his income to be, and that didn't become to him some reason to look into something?

Mr. GOODMAN. It was never made an issue.

Mr. FRANK. It is now, and you say we should look at this on our own.

Mr. GOODMAN. I don't know whether he got a refund.

Mr. FRANK. He got a refund in that year apparently of how much? He got a $4,000 refund. Regardless of the final one, he thought he had made $100,000, he paid taxes on $70,000, and ap-

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parently he just pocketed—he certainly willingly benefited from that 30 percent error in his income. Do you know anything to the contrary?

Mr. GOODMAN. If he knew it was in error, our position——

Mr. FRANK. Your position is he knew it was in error because he thought he made $100,000, and he was taxed on $70,000. So that is pretty strong argument to me.

And the second one, he got a big refund of $40,000 when he was expecting to pay a little extra. He cashed that and kept it?

Mr. GOODMAN. He thought he was going to pay——

Mr. FRANK. $20,000 and he got $40,000. Why did that not lead him to do something?

Mr. GOODMAN. It did.

Mr. FRANK. What did he do?

Mr. GOODMAN. He went to Watson and said, "Is this all right?" And Watson said it was all right.

Mr. FRANK. Watson said it was all right. That would seem to me to invalidate the argument he simply signed off on the thing without paying a lot of attention to it. It seems to me you are arguing in the alternative. In other words, on the one hand, you said he didn't know what Watson did, he signed this partial thing, and it wasn't that important.

But then there was difference of $60,000 in his liability, he went to Watson and Watson says it is OK, it seems to me you then waive your argument he didn't have any responsibility for the tax return submitted.

Mr. GOODMAN. No, not at all. He made the disclosure, he got the refund. He goes to his accountant, the accountant says he spoke to the IRS, everything is all right, and goes to a casino and cashes it. If he thought he were doing something wrong, he wouldn't cash it in a casino.

Mr. KASTENMEIER. The chair will state this is a record vote. It is a single vote. The committee will return forthwith. We will recess for 15 minutes. The chair will observe that it is 4:30; 1½ hours transpired. We have another 30 minutes upon resumption.

With that in mind, I urge my colleagues to return as quickly as possible from the vote.

The committee stands in recess for 15 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

The chair observes it is about 5:13. Regrettably we had three votes which took a bit longer than we anticipated.

We have approximately 30 minutes left. We were about to recognize the gentleman from Ohio, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

I want to thank you, Mr. Goodman, for appearing here today and presenting the position of the respondent. There are two things I would like to ask you to address.

One is with respect to the petition, or motion that is pending, and has not been finally decided, would you crystalize for us what is contained in that proceeding which has not been heard previously, and is now, and on which you might want this subcommittee to focus?

Mr. GOODMAN. Yes, I would be happy to.

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Mr. KINDNESS. No. 2, perhaps right along with that, is that in the course of the questioning here, there have been sometimes when I have felt that your answers have not been allowed to be completed, and I would invite you to complete them.

Mr. GOODMAN. Thank you, sir. The motion we have is predicated on several grounds. It is in the nature of a motion to vacate the judgment and sentence for an evidentiary hearing and for discovery proceedings.

The primary aspect of the motion talks in terms of the illegal entry into Judge Claiborne's home. If, in fact, we are correct, we believe that the suppression of the very document which caused the Government to know about the private income could be suppressed, or that count would be suppressed and reversed, and the judgment would be vacated. That is No. 1.

No. 2, we, remembering once again our allegations of misconduct by attaching the affidavits of Mr. Lee as to the pressures which were brought against him, after he passed Judge Claiborne on the polygraph, Mr. LaRue as to the pressures brought against him, because he would not cooperate against Judge Claiborne, and Mr. Watson, the tax preparer who advises as to the type of pressures which were brought upon him when he appeared before the grand jury on several occasions.

Mr. KINDNESS. Up to this point, is it correct to state that those matters present additional factual questions for the court to consider?

Mr. GOODMAN. They do, because Judge Hoffman would not permit us an evidentiary hearing on our allegations because he did not believe that they were stated with sufficient particularity, and we have attempted to satisfy that particular burden, adding to it, of course, the illegal break-in.

The reason that we believe this is important is that if in fact we are successful, and right now, it is not being litigated actively because we are waiting for the ninth circuit to tell us whether or not they are going to permit Judge Hoffman to remain as the judge who will preside over these proceedings, or whether they will appoint another judge from the ninth circuit who doesn't have any contact with Judge Claiborne, as is suggested by the dissenting opinions of the various members of the ninth circuit that we have received. If we are successful, we believe the convictions will be vacated and Judge Claiborne will not have this mark against his record.

The shame of this is that it hasn't been resolved because if it was resolved favorably to him, he wouldn't be before you gentlemen.

Mr. KINDNESS. In the remaining time, if you were not able to complete answers before, please do so now.

Mr. GOODMAN. Without any specifics, what I am trying to accomplish is to—I can't answer for Judge Claiborne's mental state of mine. Only an individual can do that for himself, and, of course, Judge Claiborne testified during the trials, and he explained why he did certain things. I think this is such an important matter to this country, and to the integrity of the judiciary, that it would be a tragedy for an impeachment to take place if, in fact, Judge Claiborne is ultimately acquitted as a result of this collateral motion that we filed, and I think that it would be best, before such a dras-

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tic step is taken, to really consider the ramifications of that and have us press ahead as quickly as we can to get the ninth circuit to designate a judge and to have a hearing and see whether or not there is going to be a binding verdict in this case.

Mr. KASTENMEIER. The gentleman's time has expired.

The gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. Thank you very much, Mr. Chairman. You were the lead counsel in this case?

Mr. GOODMAN. Yes, sir.

Mr. DEWINE. You signed all the pleadings?

Mr. GOODMAN. I did. I signed all the pleadings. I was responsible for reviewing them, if they were signed by somebody else.

Mr. DEWINE. OK, and you are fully familiar with all the facts of this case? I mean, you have been on the case from the beginning until now?

Mr. GOODMAN. At one point in time; I was more familiar with it when it was closer to the time of the trial, but, yes, I should be.

Mr. DEWINE. I want to get that clear in my mind, because of your answer to a previous question.

Mr. GOODMAN. Yes.

Mr. DEWINE. Thank you, Mr. Chairman.

Mr. MAZZOLI. Would you yield to me?

I appreciate the gentleman bringing that up, because that intrigued me about two answers to my questions.

One was what seemed to be an effort on your part to disassociate yourself with the tax counts and the only two counts that the judge was found guilty of by saying something to the effect you were in the room, but not involved. Were you involved with the preparation of the case with respect to the tax questions in the second trial?

Mr. GOODMAN. I was certainly involved with the preparation of the case, but not primarily responsible for that aspect of it.

Mr. MAZZOLI. May I continue, in answering questions, and they have been posed to you all day long, how are you answering the questions, as lead counsel, as counsel who happened to be in the room and remembered what people said, as counsel who signed the pleadings and prepared the briefs? What should we take from your answers?

Mr. GOODMAN. Depending on the individual question, they would be in different capacities. I am doing the best I can to tell you as closely as I can recollect what took place and also give you my personal feelings about certain things.

Mr. MAZZOLI. I hope I don't sound too conspiratorial here. You are not trying to get some kind of arrangement here where you can say later in some forum, perhaps the Senate, that, "Really, this subcommittee brought me in here and asked me questions in an area that I am not that expert in."

Mr. GOODMAN. No; that would never be my intention.

Mr. MAZZOLI. One further moment.

The second part that intrigued me was something, because I had a kind of an offhand comment—"We have the wrong lawyer here," and you said, "Well, I was invited."

I would like, if I could, to put, Mr. Chairman, with respect to the record, a letter dated June 13, 1986, from our Chairman, Mr.

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Rodino, addressed to Judge Harry E. Claiborne at the Federal Prison camp in Maxwell Air Force Base, Alabama, inviting him—"The committee would like to grant you the opportunity to appear personally or through counsel."

Again, you say you were invited. How were you invited to this hearing?

Mr. GOODMAN. I received, to the best of my recollection, I received a phone call indicating that Judge Claiborne and his counsel were being invited——

Mr. MAZZOLI. From whom, that phone call?

Mr. GOODMAN. Either from Mr. Remington or Ms. Mielke.

Mr. KASTENMEIER. Mr. Remington of the committee phoned you knowing that you were his counsel of record?

Mr. GOODMAN. Yes; and he advised me I was going to receive a copy of a letter addressed to Judge Claiborne.

Mr. MAZZOLI. Why would they have selected you if you were not the lead lawyer in the tax case?

Mr. GOODMAN. I was the lead lawyer for Judge Claiborne. Two out of the three——

Mr. MAZZOLI. All of the counts, first, second trial, everything?

Mr. GOODMAN. That is correct.

Mr. MAZZOLI. So then, in effect, you were invited sort of secondarily because the judge told our staff that you were his lawyer, and therefore, copies of letters could be sent to you and invitations and details——

Mr. KASTENMEIER. If the gentleman will yield, a copy of the invitation to Judge Claiborne was sent to Oscar Goodman because it was common knowledge that you were his counsel and remained his counsel for such matters.

I think that is correct.

Mr. MAZZOLI. Therefore, once again, Mr. Chairman, if I asked Mr. Goodman lastly, in answering our questions and giving us the information to the best of your knowledge and recollection, and referring to what data you brought, you are speaking as Judge Claiborne's lawyer in a very close, intimate way and not as some distant fashion, as a lawyer who may have been listed in some of the several pleadings here?

Mr. GOODMAN. No question that I am Judge Claiborne's lawyer, his primary lawyer. He is relying on me. I was trying to be very candid with you.

Mr. MAZZOLI. Thank you very much.

Mr. KASTENMEIER. The gentleman's time has expired, the gentleman from Ohio.

The gentleman from North Carolina.

Mr. COBLE. Bear with me. I have a personal illustration, and then I have a question.

My friend from Kentucky prompted this when he reminded us of the high office of Federal judges, what that entails.

I was opposing a candidate in a congressional race, and he came to me and said, "We won't discuss private lives in this campaign."

I said, "Oh, really. You want to declare your private life off limits in a congressional race?"

And I assured him that my private life was open to close scrutiny.

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I was not saying to him that my private life was impeccable. I was rather suggesting that my private life was no longer private. It became public at that point, when I became a candidate. And I think the same sort of standard applies to Federal judges, certainly as rigidly and perhaps more so.

You indicated that you feared that juries—and I presume you meant a specific jury—sometimes is prone to impose a more severe standard when public officials are being tried.

Now, I ask you, Mr. Goodman, the matter of guilt or innocense in this trial was determined based upon the standard of reasonable doubt, was it not, just as it would for any other defendant.

Mr. GOODMAN. That was the legal standard to which the jury was instructed, yes, sir.

My comments, when I addressed the gentleman, I said sometimes I get the impression that juries treat public officials and judges differently than they would an ordinary person under the same circumstances, even though no man is supposed to be above the law, and I take the position just because you are a public official, you should not be held to a higher standard than any other citizen.

Maybe that is where we differ in individual philosophies. But I think the law should be applied equally, no matter how you cut it. A man shouldn't be treated more harshly because he has a position or less so.

Mr. COBLE. I think he should be treated equally, too, and I have no reason to think that he wasn't. That is my opinion.

Mr. KASTENMEIER. Does the gentleman from Wisconsin have a question?

Mr. SENSENBRENNER. A few.

Were any part of the fines and costs of prosecution imposed against Judge Claiborne as a part of the sentence—have they been paid?

Mr. GOODMAN. I don't believe that any payment has been made as of this moment, but I will advise you that efforts are being made to gather the necessary moneys to pay the committee fine which is a five thousand plus five now, a $10,000 fine which is presently imposed.

Mr. SENSENBRENNER. There is no effort being made to raise the imposition of the costs of prosecution?

Mr. GOODMAN. We are doing one thing at a time. First the fine and then get on to the next matter.

It is very difficult to find the moneys in order to satisfy these obligations.

Mr. SENSENBRENNER. Does Judge Claiborne employ a secretary as part of his duties as the U.S. District Judge for the District of Nevada?

Mr. GOODMAN. I believe there is a secretary who is managing the office.

Mr. SENSENBRENNER. What are her duties?

Mr. GOODMAN. I cannot speak of personal knowledge, but I could advise you that she goes in on a regular basis, and I am advised that she spends the entire work day there.

Mr. SENSENBRENNER. What is the last date that Judge Claiborne performed judicial duties in the court in Nevada?

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Mr. GOODMAN. To the best of my recollection, on the day that the indictment was returned which would have been December 8, 1983, He called up Chief Judge Browning and advised Chief Browning because of the indictment, until the matter was resolved, would not actively handle any matters until specifically directed to do so by the Chief Judge.

Mr. SENSENBRENNER. Has he been directed to handle any matters since December 8, 1983?

Mr. GOODMAN. To my knowlege, he has not.

Mr. SENSENBRENNER. Has he been paid his full salary since that date?

Mr. GOODMAN. Once again, speaking from my understanding, the answer would be yes.

Mr. SENSENBRENNER. Do you know if Judge Claiborne has employed any law clerks since December 8, 1983?

Mr. GOODMAN. I believe since that time there was a law clerk who was assigned to that particular department, and my understanding is that that law clerk, because the judge was not on the premises at all times, but you should be advised that he did appear at his office, even though he wasn't handling active trial case load.

I have been advised that that law clerk has been assigned to visiting and to other judges who are handling cases in the building.

I don't know whether the same applies to Judge Claiborne's secretary.

Mr. SENSENBRENNER. Is a law clerk presently being employed in that court?

Mr. GOODMAN. I don't know the answer. I know the last law clerk that I was familiar with is now working in the District Attorney's office.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Mr. Goodman, I just have one or two questions remaining

You stated at the outset that the three judges who heard the appeal said—I think you characterized it—"did not read the record, and in one"—or except in one case—"apparently read the briefs."

Could you tell us one what you base that statement?

Mr. GOODMAN. Yes, sir. It is my recollection that when we were making the argument in the ninth circuit court of appeals that the judge advised us from the bench that they had not read the transcripts, one judge had read the briefs, and that they advised each other after the argument was completed that the transcripts should be disseminated amongst them so they would have an opportunity to read them and then render their decision.

But at the time that the argument was made, it was as though I was arguing at least to two of the judges, as I recall it, to the best of my knowledge, who knew nothing about the case.

Mr. KASTENMEIER. In the ninth circuit, or have they made those statements so that they are a matter of record?

Mr. GOODMAN. As I understand it, when we argue, it is being recorded.

I think there is a mechanical recording of it.

Mr. KASTENMEIER. Thank you.

Are there other members who may have other questions?

The gentleman from Ohio.

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Mr. DEWINE. Mr. Goodman, would it be fair to characterize you as an experienced trial attorney?

Mr. GOODMAN. I think that is fair.

Mr. DEWINE. In the criminal area?

Mr. GOODMAN. That is all I do.

Mr. DEWINE. For how many years?

Mr. GOODMAN. Exclusively criminal law? I would say—it makes me feel old—about 18 years.

Mr. DEWINE. All right. That would include, in fact, the Federal courts, as well?

Mr. GOODMAN. My practice is 95 percent Federal criminal practice.

Mr. COBLE. Mr. Chairman?

Mr. DEWINE. In that criminal practice, you would handle the filing of your own motions to suppress, your own, both pretrial motions during the trial and post-trial?

Mr. GOODMAN. I am responsible for it.

I have four lawyers who work in my office, but before anything is filed, I like to think I read it.

Mr. DEWINE. You are somewhat of an expert in the area of the motion to suppress, and you have written several articles concerning the motion to suppress, particularly in wire tap cases?

Mr. GOODMAN. That is correct.

Mr. DEWINE. I am looking at your bio here. It is a short one.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from North Carolina.

Mr. COBLE. One question I failed to ask Mr. Goodman.

During your testimony, you indicated that Judge Claiborne was running a business. I assume that you meant a law firm?

Mr. GOODMAN. Law practive, that is correct. I was just using it to show he had employees that he was responsible for.

Mr. COBLE. I thought that is what you meant.

Mr. KASTENMEIER. Are there other questions of Mr. Goodman?

If not——

Mr. GOODMAN. May I say something, Mr. Chairman?

Mr. KASTENMEIER. Yes, you may.

Mr. GOODMAN. I want to thank you gentlemen for giving me this opportunity to appear in front of you and to share with you at least some of my thoughts and views.

We may not necessarily agree with one another, but we can all agree that this is a very important matter for the people of this country, as well as for Judge Claiborne, and I appreciate as a citizen who is not familiar with the legislative process appearing before a board, a committee as honorable as you gentlemen, for the opportunity to be treated with the type of kindness and dignity that I have been, and I wanted you to hear that from me.

Mr. KASTEMEIER. Well, we appreciate that statement, Mr. Goodman.

This concludes, therefore, the testimony, but let me for the benefit of all here, members and others who have testified and Mr. Goodman, give you an idea of where we go from here in terms of this proceeding.

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We will next meet on Tuesday morning at 10 a.m., in open session in this room, for the purpose of general debate, discussion, and potentially adopting articles of impeachment.

Staff and others will in the meantime be working on matters relating to this case and may have some recommendations to make to us. I suggest that members who have interest in particular aspects may wish to communicate with staff or with me or with others, but in any event, I would hope that we may on next Tuesday dispose of it by adopting articles of impeachment, or, it is possible, by rejecting articles. In the event that the subcommittee does adopt one or more articles of impeachment, those articles forthwith will be made available to the full committee.

I do not know when the full committee may consider those articles. I assume that the full committee must make the judgment whether a record, whether the short period of time, perhaps 24 or 48 hours is not adequate, whether a record which could be available to them would make it more plausible to have what I would assume would be a single day's consideration, inasmuch as we would have next Tuesday in subcommittee, in full committee, and that day may or may not occur after the 4th of July recess.

That judgment will be up to the full committee, to the chairman, I assume.

If either before or after the recess the full committee adopts an article or articles of impeachment, that article or articles will go to the House floor in time-honored procedure and presumably there will be no delay. I would not assume there need be more than surely 1 week's delay between full committee consideration and floor consideration, unless the full committee took this up before the recess. Then in the event the House in open session on the floor does agree to one or more articles of impeachment, the matter will then be commissioned to the Senate of the United States for trial.

That is a matter which we are not currently able to advise people on, or that is a contingency we are not able to advise people on, since should that event happen, the Senate, in terms of its time schedule and its rules, may wish to—obviously it has not acted and would not act, presumably, until that contingency is upon them.

I give you that time schedule for your own guidance.

I would ask unanimous consent that the record be left open to allow relevant court documents and exhibits to be inserted, and in the event the witnesses care to submit further information to the subcommittee, I would ask that these supplemental materials also be allowed to be, or that there be permission that they be included.

I hear no objection.

Mr. SENSENBRENNER. Will the chairman yield? I think it is important, given the timetable the chairman has outlined, that the unanimous-consent agreement relative to the submission of materials for purposes of the record contain a deadline.

Mr. KASTENMEIER. Well, I would tell the gentleman from Wisconsin that inclusion of these materials in the record will not take precedence over scheduling. If they are submitted too late as to enable them to be included in the record, so be it. The schedule, the open schedules will take precedence.

Mr. KINDNESS. Mr. Chairman, Parliamentary inquiry.

With respect to the subcommittee's meeting on Tuesday next, which the chairman has stated will be an open meeting, I wonder whether, No. 1, the chairman might be prepared at that time to provide guidelines to the members of the subcommitee as to the handling of content, the testimony adduced here today, in that open meeting, or on the other hand, a motion to open the record of today's proceedings would be in order, inasmuch as I am not aware of anything being adduced today that really is not otherwise available in a public record.

Mr. KASTENMEIER. The chair will say in response to the gentleman from Ohio, you raise a good question; may I assume that the unanimous-consent request to include in the record materials with the caveat I have just stated is agreed to?

I would caution members, and other persons who are here, who are permitted to sit in on this executive session, that House rules specifically provide no evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee. Now, having said that, for our current guidance, before we meet on Tuesday morning, I will have staff—and by staff I mean minority and majority staff, they are working together on this—agree to have for us guidelines or proper motions with respect to release of materials. But until that time, these materials or this testimony taken in this session are embargoed, but we will deal with that. We will have recommendations for you, and you will have an opportunity for public debate.

Each member will be allotted time, and there will be, you will have further findings and conclusions and recommendations by that time or before that time to ponder in terms of the session on Tuesday next.

There will be further guidance with respect to embargoed materials.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Are there any other questions?

If not, this subcommittee stands adjourned.

[Thereupon, at 5:40 p.m., the subcommittee adjourned.]

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APPENDIXES

APPENDIX I

Materials Relating to H. Res. 461

IV

99TH CONGRESS
2D SESSION

H. RES. 461

Impeaching Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, of high crimes and misdemeanors.

IN THE HOUSE OF REPRESENTATIVES

JUNE 3, 1986

Mr. RODINO (for himself, Mr. FISH, Mr. BROOKS, Mr. KASTENMEIER, Mr. EDWARDS of California, Mr. GLICKMAN, Mr. MOORHEAD, and Mr. HYDE) submitted the following resolution; which was referred to the Committee on the Judiciary

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RESOLUTION

Impeaching Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, of high crimes and misdemeanors.

Resolved, That Harry E. Claiborne, Judge of the United States District Court for the District of Nevada, is impeached of high crimes and misdemeanors.

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NINETY-NINTH CONGRESS

PETER W. RODINO, JR., NEW JERSEY, CHAIRMAN

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HOWARD COBLE, NORTH CAROLINA

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U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
Telephone: 202-225-3951

June 13, 1986

The Honorable Edwin Meese III
Attorney General of the United States
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

House Resolution 461, to impeach Harry E. Claiborne of high crimes and misdemeanors, has been referred to the House Committee on the Judiciary. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice will be meeting to receive sworn testimony on H. Res. 461 at 9:00 a.m., Thursday, June 19, 1986, in Room 2141, Rayburn House Office Building.

In order to assist the preparation and focus of the testimony, I would like to apprise you of the subcommittee's scope of inquiry. The inquiry will be limited to an examination of the two counts of making and filing false statements in his tax returns [violation of Title 26 U.S.C. §7206(1)] for the two years 1979 and 1980 for which Judge Claiborne was convicted. The inquiry will also assess whether Judge Claiborne's conviction and incarceration constitute behavior incompatible with the duties and responsibilities of a federal judicial officer.

I hereby request that you designate a representative of the Department of Justice to appear before the subcommittee.

I would also like to inform you that the Committee has extended to Judge Claiborne the opportunity to appear personally. Should he avail himself of that opportunity, I will be in further touch about the logistical and security considerations relating to his temporary release and transportation to Washington, D.C.

Sincerely,

PETER W. RODINO, JR.
Chairman

PWR:mrm

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99TH CONGRESS

PETER W. RODINO, JR., NEW JERSEY, CHAIRMAN

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HOWARD COBLE, NORTH CAROLINA

GENERAL COUNSEL
M. ELAINE MIELKE

STAFF DIRECTOR
GARNER J. CLINE

ASSOCIATE COUNSEL
ALAN F. COFFEY, JR.

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
Telephone: 202-225-3951

June 13, 1986

The Honorable Harry E. Claiborne
Federal Prison Camp
Maxwell Air Force Base, Alabama 36112

Dear Judge Claiborne:

House Resolution 461, to impeach you for high crimes and misdemeanors, has been referred to the House Committee on the Judiciary. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice will be meeting to receive sworn testimony on H. Res. 461 at 9:00 a.m. on Thursday, June 19, 1986, in Room 2141, Rayburn House Office Building.

The Committee would like to grant you the opportunity to appear personally or through counsel at that time. In order to assist the preparation and focus of the testimony, I would like to apprise you of the subcommittee's scope of inquiry. The inquiry will be limited to an examination of the two counts of making and filing false statements in your tax returns [violation of Title 26 U.S.C. §7206(1)] for the two years 1979 and 1980 for which you were convicted. The inquiry will also assess whether your conviction and present incarceration constitute behavior incompatible with the duties and responsibilities of a federal judicial officer.

Please advise the Committee immediately if you accept the Committee's invitation and/or you will be represented by counsel.

Sincerely,

PETER W. RODINO, JR.
Chairman

PWR:mrm

cc: Oscar Goodman, Esq.

Enclosure (H. Res. 461)

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M. ELAINE MIELKE

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GARNER J. CLINE

ASSOCIATE COUNSEL
ALAN F. COFFEY, JR.

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515-6216
Telephone: 202-225-3951

June 16, 1986

The Honorable Charles E. Wiggins
United States Court of Appeals
for the Ninth Circuit
P. O. Box 547
San Francisco, CA 94101

Dear Judge Wiggins:

House Resolution 461, to impeach Harry E. Claiborne of high crimes and misdemeanors, has been referred to the House Committee on the Judiciary. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice will begin meeting to receive sworn testimony on H. Res. 461 at 9:00 a.m., Thursday, June 19, 1986, in Room 2141, Rayburn House Office Building.

In order to assist the preparation and focus of the testimony, I would like to apprise you of the subcommittee's scope of inquiry. The inquiry will be limited to an examination of the two counts of making and filing false statements in his tax returns [violation of Title 26 U.S.C. §7206(1)] for the two years 1979 and 1980 for which Judge Claiborne was convicted. The inquiry will also assess whether Judge Claiborne's conviction and incarceration constitute behavior incompatible with the duties and responsibilities of a federal judicial officer.

I hereby request that you appear as a witness before the Committee only on the issue of whether conviction and incarceration of a federal judge brings the judicial branch into disrepute. I would expect that your presentation would occur early Thursday afternoon or at 9:00 a.m. on Friday morning.

The Committee staff will be in contact with you regarding exact scheduling.

Sincerely,

Peter W. Rodino

PETER W. RODINO, JR.
Chairman

PWR:mrm

Enclosure

cc: The Honorable Warren E. Burger

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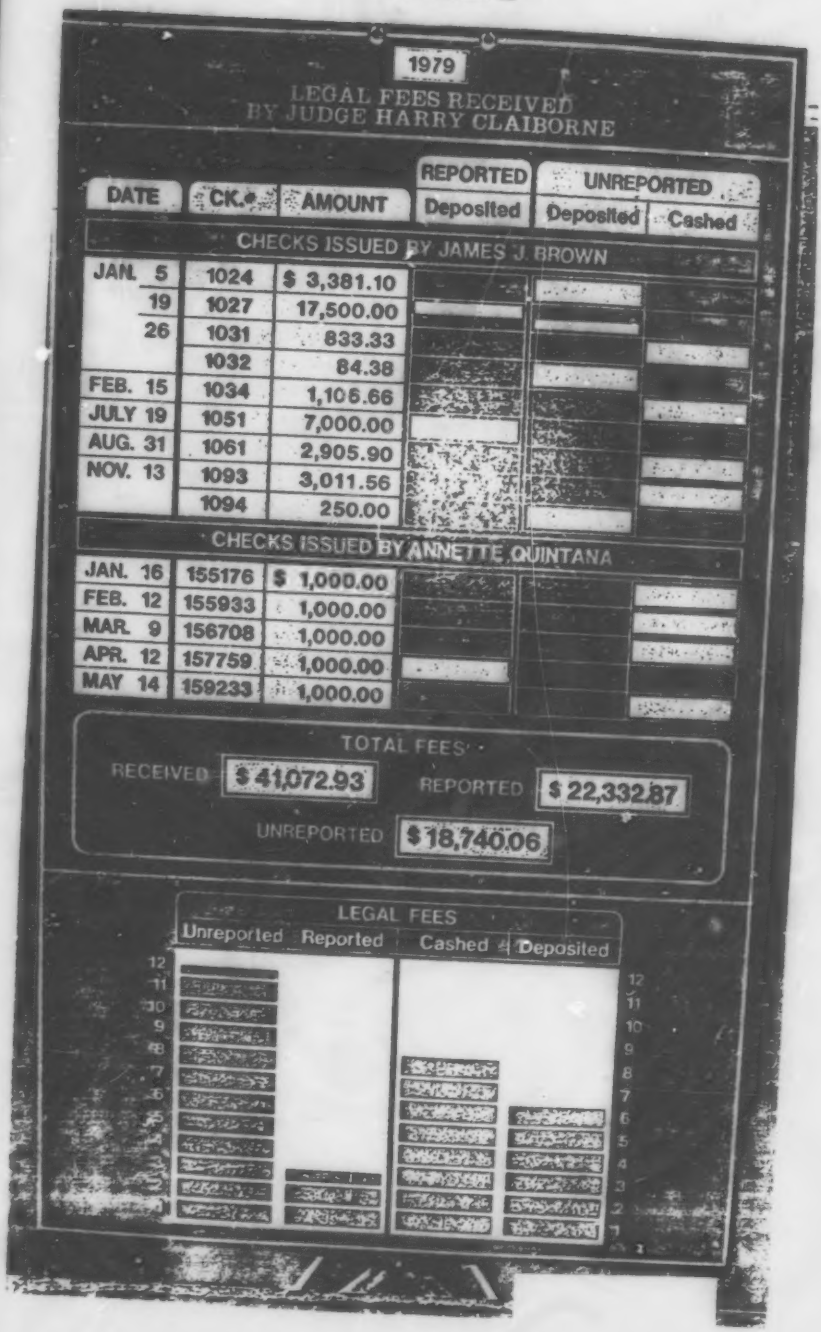
APPENDIX II



1979

LEGAL FEES RECEIVED
BY JUDGE HARRY CLAIBORNE

DATE	CK.#	AMOUNT	REPORTED Deposited	UNREPORTED Deposited	UNREPORTED Cashed
CHECKS ISSUED BY JAMES J. BROWN					
JAN. 5	1024	$ 3,381.10			
19	1027	17,500.00			
26	1031	833.33			
	1032	84.38			
FEB. 15	1034	1,106.66			
JULY 19	1051	7,000.00			
AUG. 31	1061	2,905.90			
NOV. 13	1093	3,011.56			
	1094	250.00			
CHECKS ISSUED BY ANNETTE QUINTANA					
JAN. 16	155176	$ 1,000.00			
FEB. 12	155933	1,000.00			
MAR. 9	156708	1,000.00			
APR. 12	157759	1,000.00			
MAY 14	159233	1,000.00			

TOTAL FEES

RECEIVED $41,072.93 REPORTED $22,332.87

UNREPORTED $18,740.06

LEGAL FEES

Unreported Reported Cashed Deposited

12 11 10 9 8 7 6 5 4 3 2 1

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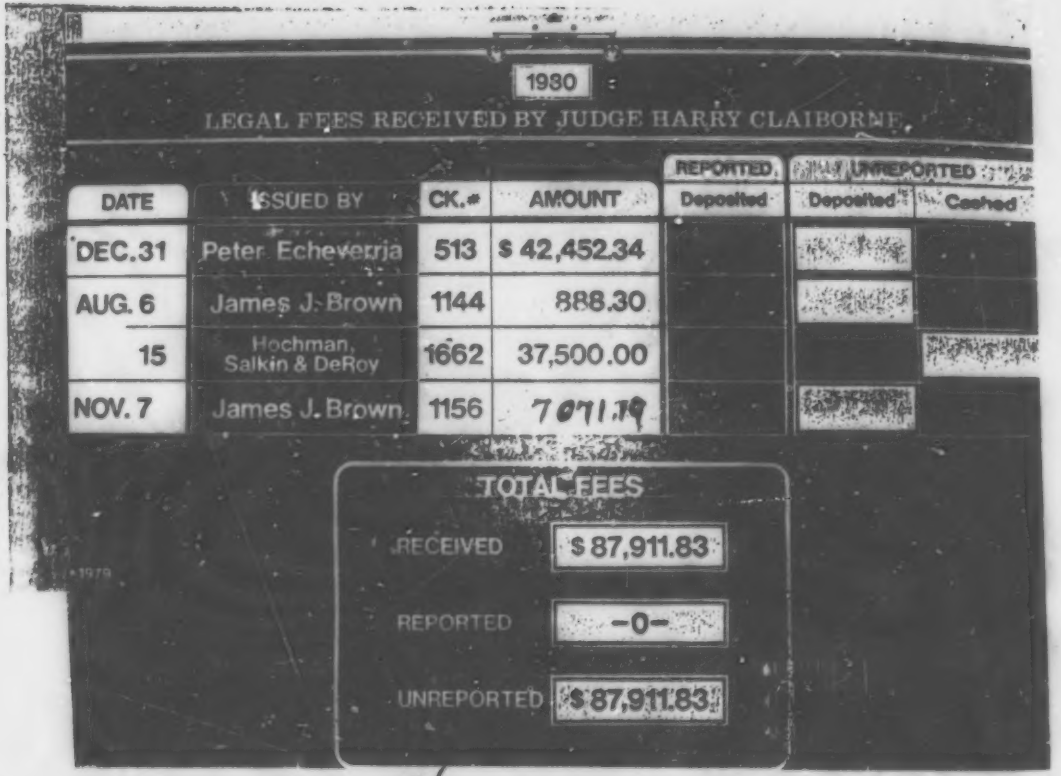
1980
LEGAL FEES RECEIVED BY JUDGE HARRY CLAIBORNE
REPORTED
UNREPORTED
DATE
ISSUED BY
CK.#
AMOUNT
Deposited
Deposited
Cashed
DEC. 31
Peter Echeverria
513
$ 42,452.34
AUG. 6
James J. Brown
1144
888.30
15
Hochman, Salkin & DeRoy
1662
37,500.00
NOV. 7
James J. Brown
1156
7071.19
TOTAL FEES
RECEIVED
$ 87,911.83
REPORTED
-0-
UNREPORTED
$ 87,911.83
1979

86

APPENDIX III

Documents Before the Subcommittee Relating to United States v. Claiborne*

1. Order for Disclosure of Return and Taxpayer Return Information, *In Re: Application of the Department of Justice for an Order Under 26 U.S.C. 6103*, Case No. Misc. 82-91 (D. Ore., filed Feb. 21, 1983) (Hoffman, J.) (signed Sept. 22, 1982) (relating to taxpayer return information of Harry Eugene Claiborne).

2. Docket Sheets, *U.S.* v. *Claiborne*, Cr. No. CR-R-83-57-WEH, Dec. 8, 1983 through June 23, 1986.

3. Indictment, *U.S.* v. *Claiborne*, Cr. No. CR-R-83-57-WEH, filed Dec. 8, 1983 (seven-count indictment).

4. Order (relating to pretrial motions, schedule, and bond), *U.S.* v. *Claiborne*, (Hoffman, J.) (filed Dec. 21, 1983).

5. Order (denying defendant's motion to extend time in which to file pretrial motions, and setting date—June 9, 1984—for hearing on motion for change of trial and pretrial hearing sites), *U.S.* v. *Claiborne*, (Hoffman, J.) (signed Dec. 27, 1983).

6. Order (relating to defendant's motion to extend time in which to file motions, and motion for change of trial and pretrial hearing sites), *U.S.* v. *Claiborne*, (amending order of Dec. 27, 1983) (Hoffman, J.) (signed Dec. 28, 1983).

7. Order (denying defendant's motion to quash indictment and dismiss proceedings: violation of judicial independence and separation of powers), *U.S.* v. *Claiborne*, (Hoffman, J.) (entered Jan. 11, 1984).

8. Order (granting government's oral motion for protective order), *U.S.* v. *Claiborne*, (Hoffman, J.) (entered Jan. 20, 1984).

9. Amended Order (amending the order of Jan. 11, 1984, relating to defendant's motion to quash indictment and dismiss proceedings, and to the government's request for clarification of the order, and continuing the trial date to March 12, 1984), *U.S.* v. *Claiborne*, (Hoffman, J.) (entered Feb. 8, 1984).

10. Order (relating to government's motion for reciprocal discovery and defendant's response), *U.S.* v. *Claiborne*, (Hoffman, J.) (signed Feb. 13, 1984).

11. *U.S.* v. *Claiborne*, No. 84-1009 (9th Cir., filed Feb. 13, 1984) (order of special panel, directing government to file a response to appellant's emergency motion for a stay and application for a writ of prohibition by Feb. 17, 1984) (Gibson, Garth, and Kennedy, Circuit Judges).

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* Unless otherwise indicated, the documents are in the case of *United States of America* v. *Harry Eugene Clairborne*, Cr. No. CR-R-83-57-WEH, in the United States District Court for the District of Nevada. Unless otherwise indicated, the documents—e.g., orders—are unpublished.

12. Order (relating to procedures for depositions and witnesses), *U.S.* v. *Claiborne*, (Hoffman, J.) (filed Feb. 17, 1984).

13. Order (denying motion to disqualify the special prosecutor; denying motion to dismiss for grand jury abuse, to discover grand jury materials, to interview grand jurors, and for evidentiary hearing, but ordering the sealing of certain grand jury transcripts and conditioning the order on the court's en camera review of the proceedings before the Oregon grand jury; denying motion to dismiss Counts IV, V, and VI of the indictment for leaks to IRS by government sources; and for additional discovery), *U.S.* v. *Claiborne*, (Hoffman, J.) (filed Feb. 17, 1984).

14. *U.S.* v. *Claiborne*, 727 F.2d 842 (9th Cir. 1984) (Gibson, Garth, and Kennedy, Circuit Judges) (affirming district court's order denying defendant's motion to quash indictment; denying petitions for writs of mandamus and prohibition; and denying as moot renewed motion for a stay) (holding Constitution does not immunize federal judge from criminal prosecution prior to his impeachment) (March 5, 1984).

15. Order (directing defendant to deliver forthwith to FBI material required under Rule 16(b)(1)(A) and (B), Fed. R. Crim. P.; ordering that material not so produced may not be introduced in defendant's case-in-chief; and ordering the U.S. to supplement its disclosure of evidence by March 9, 1984), *U.S.* v. *Claiborne*, (Hoffman, J.) (signed March 7, 1984).

16. *Claiborne* v. *U.S.* [No. A-725], 465 U.S. 1305 (1984) (Opinion in Chambers of Justice Rehnquist, denying application for stay of proceedings pending Supreme Court consideration of 9th Circuit decision of March 5, 1984) (March 12, 1984).

17. *Claiborne* v. *U.S.* [No. A-725], 465 U.S. 1092 (1984), (Miscellaneous Order denying application to stay proceedings in U.S. District Court for the District of Nevada) (White, J.) (March 14, 1984).

18. Minutes of the Court, March 12, 1984, *U.S.* v. *Claiborne* (Hoffman, J.) (filed March 30, 1984).

19. Order (granting government's motion for re-entry of matters on the record), *U.S.* v. *Claiborne* (Hoffman, J.) (filed March 13, 1984).

20. *U.S.* v. *Claiborne*, No. 84-7175 (9th Cir., filed March 14, 1984) (order of special panel directing government to file a response to petition for emergency writ of mandamus by March 16, 1984) (Gibson, Garth and Kennedy, Circuit Judges).

21. *U.S.* v. *Claiborne*, No. 84-7175 (9th Cir., filed March 19, 1984) (order denying the emergency petition for a writ of mandamus) (Gibson, Garth, and Kennedy, Circuit Judges).

22. Transcript of First Trial and Other Proceeding, *U.S.* v. *Claiborne*, Cr. No. CR-R-83-57-WEH (D. Nevada) Volumes I through XVI, pages 1-3793 (March 15, 16, 19-23, 26-30, April 2-7, 9, 11-13), and Government and Defense Exhibits.

23. Memorandum (relating to Oregon grand juries, FBI agents, special prosecutor, and subpoenas, and holding there was no prejudice to the defendant), *U.S.* v. *Claiborne* (Hoffman, J.) (signed March 27, 1984).

24. Minutes of the Court, April 4, 5, and 6, 1984, *U.S.* v. *Claiborne* (Hoffman, J.) (filed April 9, 1984).

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25. Minutes of the Court, April 13, 1984, *U.S.* v. *Claiborne* (Hoffman, J.) (filed April 13, 1984).

26. Order (setting schedule for retrial after mistrial and ordering retrial to commence on July 31, 1984, ordering that jury be sequestered and that court convene on Saturdays) *U.S.* v. *Claiborne* (Hoffman, J.) (filed April 13, 1984).

27. Order (denying defendant's motion for judicial recusal), *U.S.* v. *Claiborne* (Hoffman, J.) (signed April 27, 1984, erroneously dated "1983").

28. Order (relating to procedures for retrial including use of exhibits, tests and witnesses, and disclosure of certain "statements" to defendant) *U.S.* v. *Claiborne* (Hoffman, J.) (signed May 3, 1984).

29. Order (relating to jurors), *U.S.* v. *Claiborne* (Hoffman, J.) (filed May 7, 1984).

30. Order (relating to defendant's motion for judicial recusal and to government's motion for temporary release of defense exhibit), *U.S.* v. *Claiborne* (Hoffman, J.) (filed May 21, 1984).

31. Order (relating to sequestration of the jury), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 11, 1984).

32. Memorandum and Order on Defendant's Exhibit No. 47 (granting the government's motion for temporary release of defendant's exhibit No. 47 for examination and necessary testing, but allowing defendant to make a copy of it and to have a representative present at the examination or tests and to be promptly informed of results), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 8, 1984).

33. Order (denying defendant's motion for continuance of the scheduled trial date of July 31, 1984), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 8, 1984).

34. Order (denying defendant's motion for an order that the juror's not be subjected to sequestration) *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 18, 1984).

35. Order (denying defendant's motion for judicial recusal), *U.S.* v. *Claiborne* (Hoffman, J.) (filed June 22, 1984).

36. Government's Motion for Leave to Dismiss Counts (Counts One, Two, Three and Four of the Indictment), *U.S.* v. *Claiborne* (filed June 27, 1984).

37. *U.S.* v. *Joseph Conforte*, Criminal Action No. 83-0316 (D.D.C., filed June 27, 1984), Order (denying motion of Judge Harry E. Claiborne to vacate order sealing judicial records, noting that this record was unsealed by the Court on Dec. 15, 1983) (Smith, J.).

38. Order (granting the government's motion for leave to dismiss Counts One, Two, Three and Four, and assuming the dismissal is with prejudice to the government, and allowing John Squire Drendel, Esq., to serve as co-counsel if he will not testify for defendant), *U.S.* v. *Claiborne* (Hoffman, J.) (signed July 5, 1984).

39. Order (denying defendant's second supplement to motion for judicial recusal), *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 10, 1984).

40. Order (granting government's motion for release of exhibits) *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 27, 1984).

41. Memorandum Denying Defendant's Second Supplement to Motion for Judicial Recusal, *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 27, 1984).

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42. Order (denying (A) defendant's motion for (1) dismissal of all counts of indictment tainted by use of false testimony before grand jury and concealment of truth by prosecutor Shaw; (2) evidentiary hearings on any factual matter not admitted by the prosecution; (3) discovery of entire circumstances whereby the FBI and Prosecutor Shaw obtained confidential tax returns of defendant; and (B) motion for discovery of documents relating to misconduct of government agents and prosecutors in the unauthorized disclosure of confidential income tax returns and return information), *U.S.* v. *Claiborne* (Hoffman, J.) (filed July 30, 1984).

43. Transcript of (Second) Trial and Related Trial Proceedings before Hon. Walter E. Hoffman and a jury, *U.S.* v. *Claiborne*.

a. Transcript of Opening Statement, Aug. 2, 1984, pp. 1-44.
b. Transcript of Trial, Vol. I, Aug. 2, 1984, pp. 1-186a.
c. Transcript of Trial, Vol. II, Aug. 3, 1984, pp. 187-441a.
d. Transcript of Trial, Vol. III, Aug. 4, 1984, pp. 442-676a.
e. Transcript of Trial, Vol. IV, Aug. 6, 1984, pp. 678-903.
f. Transcript of Trial, Vol. V, Aug. 7, 1984, pp. 904-1111.
g. Transcript of Trial, Vol. VI, Aug. 8, 1984, pp. 1112-1273.
h. Transcript of Closing Arguments and Other Proceedings, Aug. 9, 1984, pp. 1-119.
i. Transcript of Verdict, Vol. VII, Aug. 10, 1984, pp. 1274-90.

44. Trial Exhibits (Second Trial):

INDEX OF EXHIBITS

	Admitted	Identified
August 2, 1984		
Government's:		
1 Form 1040 for 1977 for Harry E. Claiborne	3	
2 Form 1040 for 1978 for Harry E. Claiborne	3	
3 Form 1040 for 1979 for Harry E. Claiborne	5	
4 Form 4868, Application for Automatic Extension of Time for 1980 for Harry E. Claiborne	7	
5 Form 1040 for 1980 for Harry E. Claiborne	8	
6 Copy of nine checks from James Brown to Harry E. Claiborne during 1979	24	
7 Copy of two checks from James Brown to Harry E. Claiborne during 1980	28	
45 Street map, downtown Las Vegas, Nev.	42	
8 Copies of five letters from Annette Quintana to Harry E. Claiborne during 1979	50	
9 Copy of five checks from Annette Quintana to Harry E. Claiborne during 1979	51	
10 Copy of a communication from Harry E. Claiborne to Jay Wright	72	
11 Copy of a check signed by George DeRoy to Harry E. Claiborne dated 8/15/80	82	
12 Memorandum prepared by George DeRoy dated August 18, 1980	84	
13 Copy of check from Peter Echeverria payable to Harry E. Claiborne dated December 1979	91	
14 Copy of records from Caesar's Palance re Peter Echeverria's trip in 1979	100	
15 Signature card for checking account of Harry E. Claiborne at Pioneer Citizen's Bank	102	
16 Copy of checks and deposits slips for the account of Harry E. Claiborne at Pioneer Citizens Bank for 1979	104	
17 Copy of cashier's check and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank	106	
18 Copy of three checks, deposit slip and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank	108	
19 Copy of check, deposit slip and checking account statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank	110	
20 Copy of check, deposit slip and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank	111	
21 Copy of a check, deposit slip and bank statement for the account of Harry E. Claiborne at Pioneer Citizen's Bank	114	
22 Cash and sales record for Harry E. Claiborne for 1978	123	
23 Check register for Harry E. Claiborne for business account for 1978	125	

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INDEX OF EXHIBITS—Continued

	Admitted	Identified
25 Work paper listing income and expenses for Harry E. Claiborne for 1978	143	
25A Blow-up of Exhibit 25	144	
26 Check register for Harry E. Claiborne for 1979	153	
27 Check register for Harry E. Claiborne for 1979	154	
28 Handwritten document prepared for Jay Wright by Harry E. Claiborne	157	
28A Blowup of Exhibit 28		
29 Three letters written to financial institutions by Jay Wright on behalf of Harry E. Claiborne	159	
30 Work papers to prepare 1979 tax return for Harry E. Claiborne	165	
30A Blowup of Exhibit 30		
31 Documents relating to income and expenses for Harry E. Claiborne for 1979	170	
31A Blowup of Exhibit 31		
August 3, 1984		
Government exhibits:		
32 Signature card for Harry E. Claiborne for account at First Interstate Bank	361	
33 Deposit ticket dated 8/31/78 for $75,000 and bank statement dated 8/31/78 at First Interstate Bank.	363	
34 Check in the amount of $76,443.16 dated 8/31/78, No. 144982, signed by Harry E. Claiborne payable to Internal Revenue Service and bank statement dated 9/29/70 at First Interstate Bank.	364	
35 Deposit ticket dated 8/13/80 for $1,778.30, check deposited in the amount of $888.30 and bank statement dated 8/29/80 at First Interstate Bank.	365	
36 Deposit ticket dated 11/24/80 for $7,451.19, check deposited in the amount of $7,071.19 and bank statement dated 11/28/80.	367	
37 Check in the amount of $20,817.59 dated 4/13/81, No. 1046, signed by Harry E. Claiborne, payable to Internal Revenue Service at First Interstate Bank.	367	
38 U.S. Government tax refund check for $44,256 issued to Harry E. Claiborne on 7/24/81	370	
39 Letter dated 6/13/79 from Judge Edward Tamm to Judge Harry Claiborne re 1979 Financial Disclosure Report; letter from Judge Harry Claiborne to Judge Edward Tamm dated 6/20/79 transmitting 1978 Financial Disclosure Report; and 1978 Financial Disclosure Report of Judge Harry E. Claiborne for 1978 dated 6/20/79.	377	
39A Blowup of 1978 Financial Disclosure Report	415	
40 Financial Disclosure Report for 1979 filed May 17, 1980	378	
41 Letter Dated 8/12/81 from Judge Edward Tamm to Judge Harry E. Claiborne in re 1978, 1979 and 1980 Financial Disclosure Reports; letter dated 3/2/81 from Judge Edward Tamm to Harry Claiborne re 1979 Financial Disclosure Report; letter dated 2/18/81 from Harry Claiborne to Judge Edward Tamm re Judicial Ethics Committee; letter dated 10/21/81 from Judge Harry E. Claiborne to Judge Edward Tamm in re 1978, 1979, and 1980 Financial Disclosure Reports; and letter dated 3/31/83 from Judge Harry E. Claiborne to Judge Edward Tamm amending 1978 and 1979 Financial Disclosure Reports.		378, 423, 425, 432, 432, 434, 437
Defendant's exhibits:		
2 Letter dated 5/16/81 from Harry E. Claiborne (Financial disclosure report for 1980, filed 5/16/81).	403	
August 4, 1984		
Government's:		
5A Blowup of Exhibit 5	547	
42 Chart for 1979 Income Tax Preparation	475	
43 Chart for 1980 Income Tax Preparation	495	
Defendant's.		
2 Letter dated 5/16/81 from Harry E. Claiborne	454	
August 6, 1984		
Government's:		
47 Letter from Jerry Watson, Creative Tax Planning, to Judge Harry Claiborne, dated April 6, 1981		797
Defendant's:		
47 Black Vinyl Pad with Yellow Paper		797
3 Report of Joanne L. Becker		762
41 Handwritten Legal Yellow Sheet		778
1 Letter to Jay Wright From Harry Claiborne dated 4/11/80		861
2-A Blow-Up of Defendant's Exhibit 1		861

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INDEX OF EXHIBITS—Continued

	Admitted	Identified
4 Check dated 4/11/80 for $8,000		868
August 7, 1981		
Defense:		
47-A Photographic Blow-up of one page of Defendant's Exhibit 47		911
2-A Photographic Blow-up of first page of Defendant's Exhibit 2		911
5 1979 Schedule Prepared by Gologorsky		1055
6 1980 Schedule Prepared by Gologorsky		1063
August 8, 1984		
Government's:		
48 Log Book of Joseph Wright dated Between 8/31/78 and 6/18/80		1155
Other exhibits received by committee but not indexed by court reporter Government's exhibits:		
44 Transcript in sentencing of Richard Gordon, CR LV 81-68 HEC, July 12, 1982		
46 Chronology of 1979 legal fees of Judge Claiborne		

45. Order (denying government's introduction of evidence—the transcript of the Richard Gordon sentencing by Judge Claiborne—into its case-in-chief, but reserving the question of possible other uses of the evidence), *U.S.* v. *Claiborne*, (Hoffman, J.) (signed Aug. 3, 1984).

46. Order (setting schedule for filing post-trial motions and for filing motion for assessment of costs, continuing defendant on personal recognizance bond until sentencing date of October 3, 1984, and ordering preparation of presentence report), *U.S.* v. *Claiborne*, (Hoffman, J.) (filed Aug. 24, 1984).

47. *Claiborne* v. *U.S.* [No. 83-1992] —— U.S. ——, 105 S. Ct. 113 (1984), (denying petition for writ of certiorari) (denied Oct. 1, 1984) (case below, 727 F.2d 842, relating to pretrial motions).

48. Judgment and Probation/Commitment Order, *U.S.* v. *Claiborne*, (Hoffman, J.) (filed Oct. 3, 1984) (adjudging the defendant guilty as charged and convicted and ordering that the defendant be committed to the custody of the Attorney General for imprisonment for a period of two years and is ordered to pay a fine of $5,000 as to Count V; and under Count VI to serve two years concurrent to Count V and to pay a fine of $5,000. The sentences of confinement were imposed under Title 18 U.S.C., § 4205(b)(2)).

49. Notice of Appeal, *U.S.* v. *Claiborne*, (appeal by defendant to the U.S. Court of Appeals for the Ninth Circuit from the final judgment of conviction and sentence entered Oct. 3, 1984) (filed Oct. 3, 1984).

50. Opening Brief of Appellant, *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir. dated Jan. 15, 1985) (D. Ct. No. CR-R-83-57-WEH).

51. Appellant's Excerpts of Record, *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir., dated Jan. 15, 1985) (D. Ct. No. CR-R-83-57-WEH).

52. Brief of Appellee, *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir., dated Feb. 12, 1985).

53. Appellee's Supplemental Excerpt of Record, *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir., dated Feb. 12, 1985) (D. Ct. No. CR-R-83-57-WEH).

54. Appellant's Reply Brief, *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir., dated Feb. 26, 1985) (D. Ct. No. CR-R-83-57-WEH).

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55. Order and Judgment (affirming conviction), *U.S.* v. *Claiborne*, No. 84-1294 (D.C. No. Cr. 83-57-WEH) (9th Cir., filed and entered July 8, 1985).

56. Opinion (affirming conviction), *U.S.* v. *Claiborne*, 765 F.2d 784 (9th Cir. 1985) (Circuit Judge Pell for himself, Lumbard, and McWilliams) (July 8, 1985).

57. *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir. filed Dec. 10, 1985) (order of special panel, denying petition for rehearing and rejecting suggestion for rehearing en banc) [not in Committee's possession at this time] (Lumbard, Pell, and McWilliams, Circuit Judges).

a. *U.S.* v. *Claiborne*, 781 F.2d 1325 (9th Cir. 1985) (Ferguson, Circuit Judge, dissenting) (Dec. 30, 1985).

b. *U.S.* v. *Claiborne*, 781 F.2d 1327 (9th Cir. 1986) (Reinhardt, Circuit Judge, dissenting) (Jan. 30, 1986).

c. *U.S.* v. *Claiborne*, 781 F.2d 1334 (9th Cir. 1986) (Pregerson, Circuit Judge, dissenting) (Feb. 10, 1986, as amended March 4, 1986).

58. Brief for the United States in Opposition [to petition for a writ of certiorari], *Claiborne* v. *U.S.*, No. 85-1197 (U.S., filed March 1986).

59. *Claiborne* v. *U.S.*, [No. 85-1197] —— U.S. ——, 106 S. Ct. 1636 (1986) (denying petition for writ of certiorari) (decided April 21, 1986) (case below, 765 F.2d 784, relating to convictions on Counts V and VI).

60. Order List, U.S. Supreme Court, *Claiborne*, v. *U.S.*, No. 85-1197, notice of denial of certiorari (April 21, 1986).

61. Mandate (affirming conviction and order and judgment of 9th Circuit of July 8, 1985) issued on April 29, 1986, by Ninth Circuit, *U.S.* v. *Claiborne*, No. 84-1294, and filed in D. Ct. D. Nev. on May 1, 1986.

62. Emergency En Banc Motion for Designation of Ninth Circuit Judge, *In the Matter of Harry E. Claiborne*, No. 84-1294 (9th Cir., filed May 2, 1986) (D. Ct. No. CR-R-83-57-WEH).

63. Emergency Petition for Stay of Execution, *In the Matter of Harry E. Claiborne*, No. 84-1294 (9th Cir., filed May 2, 1986) (D. Ct. No. CR-R-83-57-WEH).

64. Motion to Stay Proceedings Pending Action By the United States Court of Appeals for the Ninth Circuit on Motions Pending in that Court Affecting this Proceeding, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH (D. Nev., filed on May 5, 1986).

65. Motion (1) to Vacate Judgment and Sentence; (2) for Evidentiary Hearing; and (3) for Discovery Proceedings, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH (D. Nev., filed on May 5, 1986).

66. Government's Opposition to Emergency Petition for Stay of Execution, *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir., filed on May 7, 1986) (D. Ct. No. CR-R-83-57-WEH).

67. Government's Opposition to Petitioner's Emergency En Banc Motion for Designation of Ninth Circuit Judge, *U.S.* v. *Claiborne*, No. 84-1294 (9th Cir., filed on May 7, 1986) (D. Ct. No. CR-R-83-57-WEH).

68. Motion for Disqualification of Government Counsel and for Order Directing Attorney General to Determine Whether Grounds Exist to Investigate Whether High Government Officials Have Committed Felonies That Warrant Appointment of Special Pros-

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ecutor, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH, (D. Nev., filed on May 8, 1986).

69. Motion Under Rule 35(a) to Stay Illegal Sentence, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH (D. Nev., filed on May 8, 1986).

70. Letter from Terence J. Anderson (a Counsel for Judge Harry E. Claiborne) to Cathy Catterson (Clerk, U.S. Court of Appeals for the Ninth Circuit) re: *Claiborne* v. *Burger* and Petition for Extraordinary Writs, dated May 8, 1986.

71. Petition for Extraordinary Writs, *Claiborne* v. *Burger*, No. 86-7267 (9th Cir., filed on May 9, 1986).

72. Appendix to Petition for Extraordinary Writs, *Claiborne* v. *Burger*, No. 86-7267 (9th Cir., filed on May 9, 1986).

73. Suggestion that Petition for Extraordinary Writs Be Heard En Banc, *Claiborne* v. *Burger*, No. 86-7267 (9th Cir., filed on May 9, 1986).

74. Supplemental Emergency Motion for Recall of Related Mandate or Stay of Execution, *Claiborne* v. *Burger*, No. 86-7267 (9th Cir., filed on May 9, 1986).

75. Government's Opposition to Defendant's Rule 35 Motion, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH (D. Nev., filed on May 9, 1986).

76. Government's Opposition to Defendant's Motion for Disqualification of Government Counsel, and for Order Directing Attorney General to Determine Whether Grounds Exist to Investigate Whether High Government Officials Have Committed Felonies That Warrant Appointment of Special Prosecutor, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH (D. Nev., filed on May 9, 1986).

77. Government's Opposition to Defendant's Motion to Vacate Judgment and Sentence and For Evidentiary Hearing and Discovery, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH (D. Nev., filed on May 9, 1986).

78. Government's Opposition to Motion to Stay Proceedings, *U.S.* v. *Claiborne*, No. CR-R-83-57-WEH (D., Nev., filed on May 9, 1986).

79. Order Denying Request for Stay of Commencement of Sentence, *U.S.* v. *Claiborne* (Hoffman, J.) (D. Nev., signed May 12, 1986).

80. Notice of Appeal (from Order Denying Request for Stay of Commencement of Sentence) *U.S.* v. *Claiborne*, No. CR-R-93-57-WEH (D. Nev., filed on May 13, 1986).

81. Order (denying petitions for stay of execution of sentence, and for appeal from district court's denial of stay of execution of his sentence, and affirming district court's denial of stay), *U.S.* v. *Claiborne*, No. 86-2018 (D.C. No. CR-R-83-57-WEH), *Claiborne* v. *Burger*, No. 86-7267 and *In the Matter of Harry E. Claiborne*, No. 86-8089 (9th Cir., filed May 14, 1986) (before Fletcher, Canby and Beezer, Circuit Judges) (Fletcher, Circuit Judge, dissenting).

82. Emergency Petition for Stay of Execution of Sentence, *In the Matter of the Emergency Petition of Harry Eugene Claiborne to Stay Execution of Sentence*, No. 86-A-883 (U.S., filed on or about May 15, 1986).

83. Order (order denying stays entered May 14, 1986 stands as entered, a majority of the nonrecused active judges of this court voting not to overrule the order), *U.S.* v. *Claiborne*, No. 86-2018, *Claiborne* v. *Burger*, No. 86-7267, and *In the Matter of Harry E.*

Claiborne, No. 86-8089 (9th Cir., filed May 15, 1986) (Fletcher, Canby and Beezer, Circuit Judges).

84. Order (orders filed May 14 and 15, 1986, to be published), *U.S.* v. *Claiborne,* No. 86-2018, *Claiborne* v. *Burger,* No. 86-7267, *In the Matter of Harry E. Claiborne,* No. 86-8089 (9th Cir., filed June 6, 1986) (Fletcher, Canby and Beezer, Circuit Judges).

85. Order (orders filed May 14 and 15 to be published, as well as dissents filed June 6, 1986), *U.S.* v. *Claiborne,* No 86-2018, *Claiborne* v. *Burger,* No. 86-7267, *In the Matter of Harry E. Claiborne,* No. 86-8089 (9th Cir., filed June 6, 1986) (Reinhardt, Circuit Judge, with whom Circuit Judges Pregerson and Ferguson join, dissenting, filed June 6, 1986) (Kozinski, Circuit Judge, with whom Circuit Judges Pregerson and Ferguson join, dissenting, filed June 6, 1986).

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APPENDIX IV

93d Congress
2d Session

HOUSE COMMITTEE PRINT

CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT

REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS
SECOND SESSION

FEBRUARY 1974

U.S. GOVERNMENT PRINTING OFFICE
28-089 WASHINGTON : 1974

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price 65 cents

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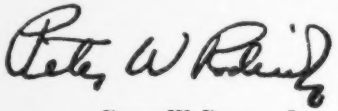
Foreword

I am pleased to make available a staff report regarding the constitutional grounds for presidential impeachment prepared for the use of the Committee on the Judiciary by the legal staff of its impeachment inquiry.

It is understood that the views and conclusions contained in the report are staff views and do not necessarily reflect those of the committee or any of its members.



PETER W. RODINO, JR.

FEBRUARY 22, 1974.

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I. Introduction

The Constitution deals with the subject of impeachment and conviction at six places. The scope of the power is set out in Article II, Section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Other provisions deal with procedures and consequences. Article I, Section 2 states:

> The House of Representatives . . . shall have the sole Power of Impeachment.

Similarly, Article I, Section 3, describes the Senate's role:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The same section limits the consequences of judgment in cases of impeachment:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Of lesser significance, although mentioning the subject, are: Article II, Section 2:

> The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Article III, Section 2:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . .

Before November 15, 1973 a number of Resolutions calling for the impeachment of President Richard M. Nixon had been introduced in the House of Representatives, and had been referred by the Speaker of the House, Hon. Carl Albert, to the Committee on the Judiciary for consideration, investigation and report. On November 15, anticipating the magnitude of the Committee's task, the House voted

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funds to enable the Committee to carry out its assignment and in that regard to select an inquiry staff to assist the Committee.

On February 6, 1974, the House of Representatives by a vote of 410 to 4 "authorized and directed" the Committee on the Judiciary "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America."

To implement the authorization (H. Res. 803) the House also provided that "For the purpose of making such investigation, the committee is authorized to require . . . by subpoena or otherwise . . . the attendance and testimony of any person . . . and . . . the production of such things; and . . . by interrogatory, the furnishing of such information, as it deems necessary to such investigation."

This was but the second time in the history of the United States that the House of Representatives resolved to investigate the possibility of impeachment of a President. Some 107 years earlier the House had investigated whether President Andrew Johnson should be impeached. Understandably, little attention or thought has been given the subject of the presidential impeachment process during the intervening years. The Inquiry Staff, at the request of the Judiciary Committee, has prepared this memorandum on constitutional grounds for presidential impeachment. As the factual investigation progresses, it will become possible to state more specifically the constitutional, legal and conceptual framework within which the staff and the Committee work.

Delicate issues of basic constitutional law are involved. Those issues cannot be defined in detail in advance of full investigation of the facts. The Supreme Court of the United States does not reach out, in the abstract, to rule on the constitutionality of statutes or of conduct. Cases must be brought and adjudicated on particular facts in terms of the Constitution. Similarly, the House does not engage in abstract, advisory or hypothetical debates about the precise nature of conduct that calls for the exercise of its constitutional powers; rather, it must await full development of the facts and understanding of the events to which those facts relate.

What is said here does not reflect any prejudgment of the facts or any opinion or inference respecting the allegations being investigated. This memorandum is written before completion of the full and fair factual investigation the House directed be undertaken. It is intended to be a review of the precedents and available interpretive materials, seeking general principles to guide the Committee.

This memorandum offers no fixed standards for determining whether grounds for impeachment exist. The framers did not write a fixed standard. Instead they adopted from English history a standard sufficiently general and flexible to meet future circumstances and events, the nature and character of which they could not foresee.

The House has set in motion an unusual constitutional process, conferred solely upon it by the Constitution, by directing the Judiciary Committee to "investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach." This action was not partisan. It was supported by the overwhelming majority of both political parties. Nor was it intended to obstruct or weaken the presidency. It was supported

by Members firmly committed to the need for a strong presidency and a healthy executive branch of our government. The House of Representatives acted out of a clear sense of constitutional duty to resolve issues of a kind that more familiar constitutional processes are unable to resolve.

To assist the Committee in working toward that resolution, this memorandum reports upon the history, purpose and meaning of the constitutional phrase, "Treason, Bribery, or other high Crimes and Misdemeanors."

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II. The Historical Origins of Impeachment

The Constitution provides that the President ". . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The framers could have written simply "or other crimes"—as indeed they did in the provision for extradition of criminal offenders from one state to another. They did not do that. If they had meant simply to denote seriousness, they could have done so directly. They did not do that either. They adopted instead a unique phrase used for centuries in English parliamentary impeachments, for the meaning of which one must look to history.

The origins and use of impeachment in England, the circumstances under which impeachment became a part of the American constitutional system, and the American experience with impeachment are the best available sources for developing an understanding of the function of impeachment and the circumstances in which it may become appropriate in relation to the presidency.

A. The English Parliamentary Practice

Alexander Hamilton wrote, in No. 65 of *The Federalist*, that Great Britain had served as "the model from which [impeachment] has been borrowed." Accordingly, its history in England is useful to an understanding of the purpose and scope of impeachment in the United States.

Parliament developed the impeachment process as a means to exercise some measure of control over the power of the King. An impeachment proceeding in England was a direct method of bringing to account the King's ministers and favorites—men who might otherwise have been beyond reach. Impeachment, at least in its early history, has been called "the most powerful weapon in the political armoury, short of civil war." [1] It played a continuing role in the struggles between King and Parliament that resulted in the formation of the unwritten English constitution. In this respect impeachment was one of the tools used by the English Parliament to create more responsive and responsible government and to redress imbalances when they occurred.[2]

The long struggle by Parliament to assert legal restraints over the unbridled will of the King ultimately reached a climax with the execution of Charles I in 1649 and the establishment of the Commonwealth under Oliver Cromwell. In the course of that struggle, Parliament sought to exert restraints over the King by removing those of his ministers who most effectively advanced the King's absolutist pur-

[1] Plucknett, "Presidential Address" reproduced in 3 *Transactions, Royal Historical Society*, 5th Series, 145 (1952).

[2] See generally C. Roberts, *The Growth of Responsible Government in Stuart England* (Cambridge 1966).

poses. Chief among them was Thomas Wentworth, Earl of Strafford. The House of Commons impeached him in 1640. As with earlier impeachments, the thrust of the charge was damage to the state.[3] The first article of impeachment alleged [4]

> That he . . . hath traiterously endeavored to subvert the Fundamental Laws and Government of the Realms . . . and in stead thereof, to introduce Arbitrary and Tyrannical Government against Law. . . .

The other articles against Strafford included charges ranging from the allegation that he had assumed regal power and exercised it tyrannically to the charge that he had subverted the rights of Parliament.[5]

Characteristically, impeachment was used in individual cases to reach offenses, as perceived by Parliament, against the system of government. The charges, variously denominated "treason," "high treason," "misdemeanors," "malversations," and "high Crimes and Misdemeanors," thus included allegations of misconduct as various as the kings (or their ministers) were ingenious in devising means of expanding royal power.

At the time of the Constitutional Convention the phrase "high Crimes and Misdemeanors" had been in use for over 400 years in impeachment proceedings in Parliament.[6] It first appears in 1386 in the impeachment of the King's Chancellor, Michael de la Pole, Earl of Suffolk.[7] Some of the charges may have involved common law offenses.[8] Others plainly did not: de la Pole was charged with breaking a promise he made to the full Parliament to execute in connection with a parliamentary ordinance the advice of a committee of nine lords regarding the improvement of the estate of the King and the realm: "this was not done, and it was the fault of himself as he was then chief officer." He was also charged with failing to expend a sum that Parliament had directed be used to ransom the town of Ghent, because of which "the said town was lost." [9]

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[3] Strafford was charged with treason, a term defined in 1352 by the Statute of Treasons, 25 Edw. 3, stat. 5, c. 2 (1352). The particular charges against him presumably would have been within the compass of the general, or "salvo," clause of that statute, but did not fall within any of the enumerated acts of treason. Strafford rested his defense in part on that failure; his eloquence on the question of retrospective treasons ("Beware you do not awake these sleeping lions, by the searching out some neglected moth-eaten records, they may one day tear you and your posterity in pieces: it was your ancestors' care to chain them up within the barricadoes of statutes; be not you ambitious to be more skilful and curious than your forefathers in the art of killing." *Celebrated Trials* 518 (Phila. 1837)) may have dissuaded the Commons from bringing the trial to a vote in the House of Lords; instead they caused his execution by bill of attainder.

[4] J. Rushworth, *The Tryal of Thomas Earl of Strafford*, in 8 Historical Collections 8 (1686).

[5] Rushworth, *supra* n. 4, at 8–9. R. Berger, *Impeachment: The Constitutional Problems* 30 (1973), states that the impeachment of Strafford ". . . constitutes a great watershed in English constitutional history of which the Founders were aware."

[6] *See generally* A. Simpson, 4 *Treatise on Federal Impeachments* 81–190 (Philadelphia, 1916) (Appendix of English Impeachment Trials); M. V. Clarke, "The Origin of Impeachment," in *Oxford Essays in Medieval History* 164 (Oxford, 1934). Reading and analyzing the early history of English impeachments is complicated by the paucity and ambiguity of the records. The analysis that follows in this section has been drawn largely from the scholarship of others, checked against the original records where possible.

The basis for what became the impeachment procedure apparently originated in 1341, when the King and Parliament alike accepted the principle that the King's ministers were to answer in Parliament for their misdeeds. C. Roberts, *supra* n. 2, at 7. Offenses against Magna Carta, for example, were falling for technicalities in the ordinary courts, and therefore Parliament provided that offenders against Magna Carta be declared in Parliament and judged by their peers. Clarke, *supra*, at 173.

[7] Simpson, *supra* n. 6, at 86; Berger, *supra* n. 5, at 61; Adams and Stevens, *Select Documents of English Constitutional History* 148 (London 1927).

[8] For example, de la Pole was charged with purchasing property of great value from the King while using his position as Chancellor to have the lands appraised at less than they were worth, all in violation of his oath, in deceit of the King and in neglect of the need of the realm. Adams and Stevens, *supra* n. 7, at 148.

[9] Adams and Stevens, *supra* n. 7, at 148–150

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The phrase does not reappear in impeachment proceedings until 1450. In that year articles of impeachment against William de la Pole, Duke of Suffolk (a descendant of Michael), charged him with several acts of high treason, but also with "high Crimes and Misdemeanors," [10] including such various offenses as "advising the King to grant liberties and privileges to certain persons to the hindrance of the due execution of the laws," "procuring offices for persons who were unfit, and unworthy of them" and "squandering away the public treasure." [11]

Impeachment was used frequently during the reigns of James I (1603–1625) and Charles I (1628–1649). During the period from 1620 to 1649 over 100 impeachments were voted by the House of Commons.[12] Some of these impeachments charged high treason, as in the case of Strafford; others charged high crimes and misdemeanors. The latter included both statutory offenses, particularly with respect to the Crown monopolies, and non-statutory offenses. For example, Sir Henry Yelverton, the King's Attorney General, was impeached in 1621 of high crimes and misdemeanors in that he failed to prosecute after commencing suits, and exercised authority before it was properly vested in him.[13]

There were no impeachments during the Commonwealth (1649–1660). Following the end of the Commonwealth and the Restoration of Charles II (1660–1685) a more powerful Parliament expanded somewhat the scope of "high Crimes and Misdemeanors" by impeaching officers of the Crown for such things as negligent discharge of duties [14] and improprieties in office.[15]

The phrase "high Crimes and Misdemeanors" appears in nearly all of the comparatively few impeachments that occurred in the eighteenth century. Many of the charges involved abuse of official power or trust. For example, Edward, Earl of Oxford, was charged in 1701 with "violation of his duty and trust" in that, while a member of the King's privy council, he took advantage of the ready access he had to the King to secure various royal rents and revenues for his own use, thereby greatly diminishing the revenues of the crown and subjecting the people of England to "grievous taxes." [16] Oxford was also charged with procuring a naval commission for William Kidd, "known to be a person of ill fame and reputation," and ordering him "to pursue the intended voyage, in which Kidd did commit diverse piracies . . ., being thereto encouraged through hopes of being protected by the high station and interest of Oxford, in violation of the law of nations, and the interruption and discouragement of the trade of England." [17]

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[10] 4 Hatsell 67 (Shannon, Ireland, 1971, reprint of London 1796, 1818).

[11] 4 Hatsell, *supra* n. 10, at 67, charges 2, 6 and 12.

[12] The Long Parliament (1640–48) alone impeached 98 persons. Roberts, *supra* n. 2, at 133.

[13] 2 Howell *State Trials* 1135, 1136–37 (*charges 1, 2 and 6*). *See generally* Simpson, *supra* n. 6, at 91–127; Berger, *supra* n. 5, at 67–73.

[14] Peter Pett, Commissioner of the Navy, was charged in 1668 with negligent preparation for an invasion by the Dutch, and negligent loss of a ship. The latter charge was predicated on alleged willful neglect in failing to insure that the ship was brought to a mooring. 6 Howell *State Trials* 865, 866–67 (*charges 1, 5*).

[15] Chief Justice Scroggs was charged in 1680, among other things, with browbeating witnesses and commenting on their credibility, and with cursing and drinking to excess, thereby bringing "the highest scandal on the public justice of the kingdom." 8 Howell *State Trials* 197, 200 (*charges 7, 8*).

[16] Simpson, *supra* n. 6, at 141.

[17] Simpson, *supra* n. 6, at 144.

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The impeachment of Warren Hastings, first attempted in 1786 and concluded in 1795,[18] is particularly important because contemporaneous with the American Convention debates. Hastings was the first Governor-General of India. The articles indicate that Hastings was being charged with high crimes and misdemeanors in the form of gross maladministration, corruption in office, and cruelty toward the people of India.[19]

Two points emerge from the 400 years of English parliamentary experience with the phrase "high Crimes and Misdemeanors." First, the particular allegations of misconduct alleged damage to the state in such forms as misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruption, and betrayal of trust.[20] Second, the phrase "high Crimes and Misdemeanors" was confined to parliamentary impeachments; it had no roots in the ordinary criminal law,[21] and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions or crimes.

B. The Intention of the Framers

The debates on impeachment at the Constitutional Convention in Philadelphia focus principally on its applicability to the President. The framers sought to create a responsible though strong executive; they hoped, in the words of Elbridge Gerry of Massachusetts, that "the maxim would never be adopted here that the chief Magistrate could do [no] wrong."[22] Impeachment was to be one of the central elements of executive responsibility in the framework of the new government as they conceived it.

The constitutional grounds for impeachment of the President received little direct attention in the Convention: the phrase "other high Crimes and Misdemeanors" was ultimately added to "Treason" and "Bribery" with virtually no debate. There is evidence, however, that the framers were aware of the technical meaning the phrase had acquired in English impeachments.

Ratification by nine states was required to convert the Constitution from a proposed plan of government to the supreme law of the land. The public debates in the state ratifying conventions offer evidence of the contemporaneous understanding of the Constitution equally as compelling as the secret deliberations of the delegates in Philadelphia. That evidence, together with the evidence found in the debates during the First Congress on the power of the President to discharge an executive officer appointed with the advice and consent of the Senate,

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[18] *See generally* Marshall, *The Impeachment of Warren Hastings* (Oxford, 1965).

[19] Of the original resolutions proposed by Edmund Burke in 1786 and accepted by the House as articles of impeachment in 1787, both criminal and non-criminal offenses appear. The fourth article, for example, charging that Hastings had confiscated the landed income of the Begums of Oudh, was described by Pitt as that of all others that bore the strongest marks of criminality. Marshall, *supra*, n. 19, at 53.

The third article, on the other hand, known as the Benares charge, claimed that circumstances imposed upon the Governor General a duty to conduct himself "on the most distinguished principles of good faith, equity, moderation and mildness." Instead, continued the charge, Hastings provoked a revolt in Benares, resulting in "the arrest of the rajah, three revolutions in the country, and great loss, whereby the said Hastings is guilty of a high crime and misdemeanor in the destruction of the country aforesaid." The Commons accepted this article, voting 119–79 that these were grounds for impeachment. Simpson, *supra* n. 6, at 168–170; Marshall, *supra* n. 19, at xv, 46.

[20] *See, e.g.*, Berger, *supra* n. 5, at 70–71.

[21] Berger, *supra* n. 5, at 62.

[22] *The Records of the Federal Convention* 66 (M. Farrand ed. 1911) (brackets in original). Hereafter cited as Farrand.

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shows that the framers intended impeachment to be a constitutional safeguard of the public trust, the powers of government conferred upon the President and other civil officers, and the division of powers among the legislative, judicial and executive departments.

I. THE PURPOSE OF THE IMPEACHMENT REMEDY

Among the weaknesses of the Articles of Confederation apparent to the delegates to the Constitutional Convention was that they provided for a purely legislative form of government whose ministers were subservient to Congress. One of the first decisions of the delegates was that their new plan should include a separate executive, judiciary, and legislature.[23] However, the framers sought to avoid the creation of a too-powerful executive. The Revolution had been fought against the tyranny of a king and his council, and the framers sought to build in safeguards against executive abuse and usurpation of power. They explicitly rejected a plural executive, despite arguments that they were creating "the foetus of monarchy,"[24] because a single person would give the most responsibility to the office.[25] For the same reason, they rejected proposals for a council of advice or privy council to the executive.[25a]

The provision for a single executive was vigorously defended at the time of the state ratifying conventions as a protection against executive tyranny and wrongdoing. Alexander Hamilton made the most carefully reasoned argument in Federalist No. 70, one of the series of *Federalist Papers* prepared to advocate the ratification of the Constitution by the State of New York. Hamilton criticized both a plural executive and a council because they tend "to conceal faults and destroy responsibility." A plural executive, he wrote, deprives the people of "the two greatest securities they can have for the faithful

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[23] 1 Farrand 322.

[24] 1 Farrand 66.

[25] This argument was made by James Wilson of Pennsylvania, who also said that he preferred a single executive "as giving most energy, dispatch and responsibility to the office." 1 Farrand 65.

[25a] A number of suggestions for a Council to the President were made during the Convention. Only one was voted on, and it was rejected three states to eight. This proposal, by George Mason, called for a privy council of six members—two each from the eastern, middle, and southern states—selected by the Senate for staggered six year terms, with two leaving office every two years. 2 Farrand 335, 342.

Gouverneur Morris and Charles Pinckney, both of whom spoke in opposition to other proposals for a council, suggested a privy council composed of the Chief Justice and the heads of executive departments. Their proposal, however, expressly provided that the President "shall in all cases exercise his own judgment, and either conform to [the] opinions [of the council] or not as he may think proper." Each officer who was a member of the council would "be responsible for his opinion on the affairs relating to his particular Department" and liable to impeachment and removal from office "for neglect of duty malversation, or corruption." 2 Farrand 342–44.

Morris and Pinckney's proposal was referred to the Committee on Detail, which reported a provision for an expanded privy council including the President of the Senate and the Speaker of the House. The council's duty was to advise the President "in matters respecting the execution of his office, which he shall think proper to lay before them; but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt." 2 Farrand 367. This provision was never brought to a vote or debated in the Convention.

Opponents of a council argued that it would lessen executive responsibility. A council, said James Wilson, "oftener serves to cover than prevent malpractices." 1 Farrand 97. And the Committee of Eleven, consisting of one delegate from each state, to which proposals for a council to the President as well as other questions of policy were referred, decided against a council, on the ground that the President, "by persuading his Council—to concur in his wrong measures, would acquire their protection for them." 2 Farrand 542.

Some delegates thought the responsibility of the President to be "chimerical"; Gunning Bedford because "he could not be punished for mistakes." 2 Farrand 43; Elbridge Gerry, with respect to nomination for offices, because the President could "always plead ignorance." 2 Farrand 539. Benjamin Franklin favored a Council because it "would not only be a check on a bad President but a relief to a good one." He asserted that the delegates had "too much . . . fear [of] cabals in appointments by a number," and "too much confidence in those of single persons." Experience, he said, showed that "caprice, the intrigues of favorites & mistresses, &c." were "the means most prevalent in monarchies." 2 Farrand 542.

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exercise of any delegated power"—"[r]esponsibility . . . to censure and to punishment." When censure is divided and responsibility uncertain, "the restraints of public opinion . . . lose their efficacy" and "the opportunity of discovering with facility and clearness the misconduct of the persons [the public] trust, in order either to their removal from office, or to their actual punishment in cases which admit of it" is lost.[26] A council, too, "would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself."[27] It is, Hamilton concluded, "far more safe [that] there should be a single object for the jealousy and watchfulness of the people; . . . all multiplication of the Executive is rather dangerous than friendly to liberty."[28]

James Iredell, who played a leading role in the North Carolina ratifying convention and later became a justice of the Supreme Court, said that under the proposed Constitution the President "is of a very different nature from a monarch. He is to be . . . personally responsible for any abuse of the great trust reposed in him."[29] In the same convention, William R. Davie, who had been a delegate in Philadelphia, explained that the "predominant principle" on which the Convention had provided for a single executive was "the more obvious responsibility of one person." When there was but one man, said Davie, "the public were never at a loss" to fix the blame.[30]

James Wilson, in the Pennsylvania convention, described the security furnished by a single executive as one of its "very important advantages":

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality; no appointment can take place without his nomination; and he is responsible for every nomination he makes. . . . Add to all this, that officer is placed high, and is possessed of power far from being contemptible, yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*.[31]

As Wilson's statement suggests, the impeachability of the President was considered to be an important element of his responsibility.

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[26] *The Federalist* No. 70, at 459–61 (Modern Library ed.) (A. Hamilton) (hereinafter cited as *Federalist*). The "multiplication of the Executive," Hamilton wrote, "adds to the difficulty of detection":

> The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

If there should be "collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?" *Id.* at 460.

[27] *Federalist* No. 70 at 461. Hamilton stated:

> A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad, and are almost always a cloak to his faults. *Id.* at 462–63.

[28] *Federalist* No. 70 at 462.

[29] 4 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 74 (reprint of 2d ed.) (hereinafter cited as Elliot.)

[30] Elliot 104.

[31] 2 Elliot 480 (emphasis in original).

Impeachment had been included in the proposals before the Constitutional Convention from its beginning.[32] A specific provision, making the executive removable from office on impeachment and conviction for "mal-practice or neglect of duty," was unanimously adopted even before it was decided that the executive would be a single person.[33]

The only major debate on the desirability of impeachment occurred when it was moved that the provision for impeachment be dropped, a motion that was defeated by a vote of eight states to two.[34]

One of the arguments made against the impeachability of the executive was that he "would periodically be tried for his behavior by his electors" and "ought to be subject to no intermediate trial, by impeachment."[35] Another was that the executive could "do no criminal act without Coadjutors [assistants] who may be punished."[36] Without his subordinates, it was asserted, the executive "can do nothing of consequence," and they would "be amenable by impeachment to the public Justice."[37]

This latter argument was made by Gouverneur Morris of Pennsylvania, who abandoned it during the course of the debate, concluding that the executive should be impeachable.[38] Before Morris changed his position, however, George Mason had replied to his earlier argument:

> Shall any man be above justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors.[39]

James Madison of Virginia argued in favor of impeachment stating that some provision was "indispensible" to defend the community against "the incapacity, negligence or perfidy of the chief Magistrate." With a single executive, Madison argued, unlike a legislature whose collective nature provided security, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic."[40] Benjamin Franklin supported

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[32] The Virginia Plan, fifteen resolutions proposed by Edmund Randolph at the beginning of the Convention, served as the basis of its early deliberations. The ninth resolution gave the national judiciary jurisdiction over "impeachments of any National officers." 1 Farrand 22.

[33] 1 Farrand 88. Just before the adoption of this provision, a proposal to make the executive removable from office by the legislature upon request of a majority of the state legislatures had been overwhelmingly rejected. *Id.* 87. In the course of debate on this proposal, it was suggested that the legislature "should have power to remove the Executive at pleasure"—a suggestion that was promptly criticized as making him "the mere creature of the Legislature" in violation of "the fundamental principle of good Government," and was never formally proposed to the Convention. *Id.* 85–86.

[34] 2 Farrand 64, 69.

[35] 2 Farrand 67 (Rufus King). Similarly, Gouverneur Morris contended that if an executive charged with a criminal act were reelected, "that will be sufficient proof of his innocence." *Id.* 64.

It was also argued in opposition to the impeachment provision, that the executive should not be impeachable "whilst in office"—an apparent allusion to the constitutions of Virginia and Delaware, which then provided that the governor (unlike other officers) could be impeached only after he left office. *Id.* See 7 Thorpe, *The Federal and State Constitutions* 3818 (1909) and 1 *id.* 566. In response to this position, it was argued that corrupt elections would result, as an incumbent sought to keep his office in order to maintain his immunity from impeachment. He will "spare no efforts or no means whatever to get himself reelected," contended William R. Davie of North Carolina. 2 Farrand 64. George Mason asserted that the danger of corrupting electors "furnished a peculiar reason in favor of impeachments whilst in office": "Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?" *Id.* 65.

[36] 2 Farrand 64.

[37] 2 Farrand 54.

[38] "This Magistrate is not the King but the prime-Minister. The people are the King." 2 Farrand 69.

[39] 2 Farrand 65.

[40] 2 Farrand 65–66.

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impeachment as "favorable to the executive"; where it was not available and the chief magistrate had "rendered himself obnoxious," recourse was had to assassination. The Constitution should provide for the "regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused."[41] Edmund Randolph also defended "the propriety of impeachments":

> The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided it will be irregularly inflicted by tumults & insurrections.[42]

The one argument made by the opponents of impeachment to which no direct response was made during the debate was that the executive would be too dependent on the legislature—that, as Charles Pinckney put it, the legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence."[43] That issue, which involved the forum for trying impeachments and the mode of electing the executive, troubled the Convention until its closing days. Throughout its deliberations on ways to avoid executive subservience to the legislature, however, the Convention never reconsidered its early decision to make the executive removable through the process of impeachment.[44]

2. ADOPTION OF "HIGH CRIMES AND MISDEMEANORS"

Briefly, and late in the Convention, the framers addressed the question how to describe the grounds for impeachment consistent with its intended function. They did so only after the mode of the President's election was settled in a way that did not make him (in the words of James Wilson) "the Minion of the Senate."[45]

The draft of the Constitution then before the Convention provided for his removal upon impeachment and conviction for "treason or bribery." George Mason objected that these grounds were too limited:

> Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments.[46]

Mason then moved to add the word "maladministration" to the other two grounds. Maladministration was a term in use in six of the thirteen state constitutions as a ground for impeachment, including Mason's home state of Virginia.[47]

When James Madison objected that "so vague a term will be

[41] 2 Farrand 65.
[42] 2 Farrand 67.
[43] 2 Farrand 66.
[44] See Appendix B for a chronological account of the Convention's deliberations on impeachment and related issues.
[45] 2 Farrand 523.
[46] 2 Farrand 550.
[47] The grounds for impeachment of the Governor of Virginia were "mal-administration, corruption, or other means, by which the safety of the State may be endangered." 7 Thorpe, *The Federal and State Constitution* 3818 (1909).

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equivalent to a tenure during pleasure of the Senate." Mason withdrew "mala [m]inistration" and substituted "high crimes and misdemeanors agst. the State," which was adopted eight states to three, apparently with no further debate.[48]

That the framers were familiar with English parliamentary impeachment proceedings is clear. The impeachment of Warren Hastings, Governor-General of India, for high crimes and misdemeanors was voted just a few weeks before the beginning of the Constitutional Convention and George Mason referred to it in the debates.[49] Hamilton, in the *Federalist* No. 65, referred to Great Britain as "the model from which [impeachment] has been borrowed." Furthermore, the framers were well-educated men. Many were also lawyers. Of these, at least nine had studied law in England.[50]

The Convention had earlier demonstrated its familiarity with the term "high misdemeanor." [51] A draft constitution had used "high misdemeanor" in its provision for the extradition of offenders from one state to another.[52] The Convention, apparently unanimously struck "high misdemeanor" and inserted "other crime," "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." [53]

The "technical meaning" referred to is the parliamentary use of the term "high misdeameanor." Blackstone's *Commentaries on the Laws of England*—a work cited by delegates in other portions of the Convention's deliberations and which Madison later described (in the Virginia ratifying convention) as "a book which is in every man's hand" [54]—included "high misdemeanors" as one term for positive offenses "against the king and government." The "first and principal" high misdemeanor, according to Blackstone, was "mal-administration of such high officers, as are in public trust and employment," usually punished by the method of parliamentary impeachment." [55]

"High Crimes and Misdemeanors" has traditionally been considered a "term of art," like such other constitutional phrases as "levying war" and "due process." The Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the farmers meant when they adopted them.[56] Chief Justice Marshall wrote of another such phrase:

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[48] 2 Farrand 550. Mason's wording was unanimously changed later the same day from "agst. the State" to "against the United States" in order to avoid ambiguity. This phrase was later dropped in the final draft of the Constitution prepared by the Committee on Style and Revision, which was charged with arranging and improving the language of the articles adopted by the Convention without altering its substance.

[49] *Id.*

[50] R. Berger, *Impeachment: The Constitutional Problems* 87, 89 and accompanying notes (1973).

[51] As a technical term, a "high" crime signified a crime against the system of government, not merely a serious crime. "This element of injury to the commonwealth—that is, to the state itself and to its constitution—was historically the criterion for distinguishing a 'high' crime or misdemeanor from an ordinary one. The distinction goes back to the ancient law of treason, which differentiated 'high' from 'petit' treason." Bestor, Book Review, 49 Wash. L. Rev. 255, 263–64 (1973). *See* 4 W. Blackstone, Commentaries* 75.

[52] The provision (article XV of Committee draft of the Committee on Detail) originally read: "Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence." 2 Farrand 187–88.

This clause was virtually identical with the extradition clause contained in article IV of the Articles of Confederation, which referred to "any Person guilty of, or charged with treason, felony, or other high misdemeanor in any state. . . ."

[53] 2 Farrand 443.

[54] 3 Elliott 501.

[55] 4 Blackstone's Commentaries* 121 (emphasis omitted).

[56] *See* Murray v. Hoboken Land Co., 52 U.S. (18 How.) 272 (1856); Davidson v. New Orleans, 96 U.S. 97 (1878); Smith v. Alabama, 124 U.S. 465 (1888).

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> It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.[57]

3. GROUNDS FOR IMPEACHMENT

Mason's suggestion to add "maladministration," Madison's objection to it as "vague," and Mason's substitution of "high crimes and misdemeanors agst the State" are the only comments in the Philadelphia convention specifically directed to the constitutional language describing the grounds for impeachment of the President. Mason's objection to limiting the grounds to treason and bribery was that treason would "not reach many great and dangerous offences" including "[a]ttempts to subvert the Constitution."[58] His willingness to substitute "high Crimes and Misdemeanors," especially given his apparent familiarity with the English use of the term as evidenced by his reference to the Warren Hastings impeachment, suggests that he believed "high Crimes and Misdemeanors" would cover the offenses about which he was concerned.

Contemporaneous comments on the scope of impeachment are persuasive as to the intention of the framers. In *Federalist* No. 65, Alexander Hamilton described the subject of impeachment as

> those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.[59]

Comments in the state ratifying conventions also suggest that those who adopted the Constitution viewed impeachment as a remedy for usurpation or abuse of power or serious breach of trust. Thus, Charles Cotesworth Pinckney of South Carolina stated that the impeachment power of the House reaches "those who behave amiss, or betray their public trust."[60] Edmund Randolph said in the Virginia convention that the President may be impeached if he "misbehaves."[61] He later cited the example of the President's receipt of presents or emoluments from a foreign power in violation of the constitutional prohibition of Article I, section 9.[62] In the same convention George Mason argued that the President might use his pardoning power to "pardon crimes which were advised by himself" or, before indictment or conviction, "to stop inquiry and prevent detection." James Madison responded:

> [I]f the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will

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[57] *United States* v. *Burr*, 25 Fed. Cas. 1, 159 (No. 14, 693) (C.C.D. Va. 1807).
[58] 2 Farrand 550.
[59] *The Federalist* No. 65 at 423–24 (Modern Library ed.) (A. Hamilton) (emphasis in original).
[60] 4 Elliot 281.
[61] 3 Elliot 201.
[62] 3 Elliot 486.

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> shelter him, the House of Representatives can impeach him; they can remove him if found guilty. . . .[63]

In reply to the suggestion that the President could summon the Senators of only a few states to ratify a treaty, Madison said,

> Were the President to commit any thing so atrocious . . . he would be impeached and convicted, as a majority of the states would be affected by his misdemeanor.[64]

Edmund Randolph referred to the checks upon the President:

> It has too often happened that powers delegated for the purpose of promoting the happiness of a community have been perverted to the advancement of the personal emoluments of the agents of the people; but the powers of the President are too well guarded and checked to warrant this illiberal aspersion.[65]

Randolph also asserted, however, that impeachment would not reach errors of judgment: "No man ever thought of impeaching a man for an opinion. It would be impossible to discover whether the error in opinion resulted from a wilful mistake of the heart, or an involuntary fault of the head."[66]

James Iredell made a similar distinction in the North Carolina convention, and on the basis of this principle said, "I suppose the only instances, in which the President would be liable to impeachment, would be where he had received a bribe, or had acted from some corrupt motive or other."[67] But he went on to argue that the President

> must certainly be punishable for giving false information to the Senate. He is to regulate all intercourse with foreign powers, and it is his duty to impart to the Senate every material intelligence he receives. If it should appear that he has not given them full information, but has concealed important intelligence which he ought to have communicated, and by that means induced them to enter into measures injurious to their country, and which they would not have consented to had the true state of things been disclosed to them,—in this case, I ask whether, upon an impeachment for a misdemeanor upon such an account, the Senate would probably favor him.[68]

In short, the framers who discussed impeachment in the state ratifying conventions, as well as other delegates who favored the Constitution,[69] implied that it reached offenses against the government, and

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[63] 3 Elliot 497–98. Madison went on to say, contrary to his position in the Philadelphia convention, that the President could be suspended when suspected, and his powers would devolve on the Vice President, who could likewise be suspended until impeached and convicted, if he were also suspected. *Id.* 498.

[64] 3 Elliot 500. John Rutledge of South Carolina made the same point, asking "whether gentlemen seriously could suppose that a President, who has a character at stake, could be such a fool and knave as to join with ten others [two-thirds of a minimal quorum of the Senate] to tear up liberty by the roots, when a full Senate were competent to impeach him." 4 Elliot 258.

[65] 3 Elliot 117.

[66] 3 Elliot 401.

[67] 4 Elliot 126.

[68] 4 Elliot 127.

[69] For example, Wilson Nicholas in the Virginia convention asserted that the President "is personally amenable for his mal-administration" through impeachment. 3 Elliot 15; George Nicholas in the same convention referred to the President's impeachability if he "deviates from his duty." *Id.* 240. Archibald MacLaine in the South Carolina convention also referred to the President's impeachability for "any maladministration in his office." 4 Elliot 47; and Reverend Samuel Stillman of Massachusetts referred to his impeachability for "misconduct," asking, "With such a prospect, who will dare to abuse the powers vested in him by the people?" 2 Elliot 159.

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especially abuses of constitutional duties. The opponents did not argue that the grounds for impeachment had been limited to criminal offenses.

An extensive discussion of the scope of the impeachment power occurred in the House of Representatives in the First Session of the First Congress. The House was debating the power of the President to remove the head of an executive department appointed by him with the advice and consent of the Senate, an issue on which it ultimately adopted the position, urged primarily by James Madison, that the Constitution vested the power exclusively in the President. The discussion in the House lends support to the view that the framers intended the impeachment power to reach failure of the President to discharge the responsibilities of his office.[70]

Madison argued during the debate that the President would be subject to impeachment for "the wanton removal of meritorious officers."[71] He also contended that the power of the President unilaterally to remove subordinates was "absolutely necessary" because "it will make him in a peculiar manner, responsible for [the] conduct" of executive officers. It would, Madison said,

> subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses.[72]

Elbridge Gerry of Massachusetts, who had also been a framer though he had opposed the ratification of the Constitution, disagreed with Madison's contentions about the impeachability of the President. He could not be impeached for dismissing a good officer, Gerry said, because he would be "doing an act which the Legislature has submitted to his discretion."[73] And he should not be held responsible for the acts of subordinate officers, who were themselves subject to impeachment and should bear their own responsibility.[74]

Another framer, Abraham Baldwin of Georgia, who supported Madison's position on the power to remove subordinates, spoke of the President's impeachability for failure to perform the duties of the executive. If, said Baldwin, the President "in a fit of passion" removed "all the good officers of the Government" and the Senate were unable to choose qualified successors, the consequence would be that the President "would be obliged to do the duties himself; or, if he did not, we would impeach him, and turn him out of office, as he had done others."[75]

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[70] Chief Justice Taft wrote with reference to the removal power debate in the opinion for the Court in *Myers* v. *United States*, that constitutional decisions of the First Congress "have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." 272 U.S. 52, 174–75 (1926).

[71] 1 Annals of Cong. 498 (1789).

[72] *Id.* 372–73.

[73] *Id.* 502.

[74] *Id.* 535–36. Gerry also implied, perhaps rhetorically, that a violation of the Constitution was grounds for impeachment. If, he said, the Constitution failed to include provision for removal of executive officers, an attempt by the legislature to cure the omission would be an attempt to amend the Constitution. But the Constitution provided procedures for its amendment, and "an attempt to amend it in any other way may be a high crime or misdemeanor, or perhaps something worse." *Id.* 503.

[75] *Id.* John Vining of Delaware commented:

"The President. What are his duties? To see the laws faithfully executed: if he does not do this effectually, he is responsible. To whom? To the people. Have they the means of calling him to account, and punishing him for neglect? They have secured it in the Constitution, by impeachment, to be presented by their immediate representatives: if they fail here, they have another check when the time of election comes round." *Id.* 572.

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Those who asserted that the President has exclusive removal power suggested that it was necessary because impeachment, as Elias Boudinot of New Jersey contended, is "intended as a punishment for a crime, and not intended as the ordinary means of re-arranging the Departments." [76] Boudinot suggested that disability resulting from sickness or accident "would not furnish any good ground for impeachment; it could not be laid as treason or bribery, nor perhaps as a high crime or misdemeanor." [77] Fisher Ames of Massachusetts argued for the President's removal power because "mere intention [to do a mischief] would not be cause of impeachment" and "there may be numerous causes for removal which do not amount to a crime." [78] Later in the same speech Ames suggested that impeachment was available if an officer "misbehaves" [79] and for "mal-conduct." [80]

One further piece of contemporary evidence is provided by the *Lectures on Law* delivered by James Wilson of Pennsylvania in 1790 and 1791. Wilson described impeachments in the United States as "confined to political characters, to political crimes and misdemeanors, and to political punishment." [81] And, he said:

> The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. No one should be secure while he violates the constitution and the laws: every one should be secure while he observes them.[82]

From the comments of the framers and their contemporaries, the remarks of the delegates to the state ratifying conventions, and the removal power debate in the First Congress, it is apparent that the scope of impeachment was not viewed narrowly. It was intended to provide a check on the President through impeachment, but not to make him dependent on the unbridled will of the Congress.

Impeachment, as Justice Joseph Story wrote in his *Commentaries on the Constitution* in 1833, applies to offenses of "a political character":

> Not but that crimes of a strictly legal character fall within the scope of the power . . .; but that it has a more enlarged operation, and reaches, what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and

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[76] *Id.* 375.
[77] *Id.*
[78] *Id.* 474.
[79] *Id.* 475.
[80] *Id.* 477. The proponents of the President's removal power were careful to preserve impeachment as a supplementary method of removing executive officials. Madison said impeachment will reach a subordinate "whose bad actions may be connived at or overlooked by the President." *Id.* 372. Abraham Baldwin said:

"The Constitution provides for—what? That no bad man should come into office. . . . But suppose that one such could be got in, he can be got out again in despite of the President. We can impeach him, and drag him from his place . . . ." *Id.* 558.

[81] Wilson, *Lectures on Law*, in 1 *The Works of James Wilson* 426 (R. McCloskey ed. 1967).
[82] *Id.* 425.

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duty. They must be judged of by the habits and rules and principles of diplomacy, or departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations of foreign as well as domestic political movements; and in short, by a great variety of circumstances, as well those which aggravate as those which extenuate or justify the offensive acts which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence.[83]

C. The American Impeachment Cases

Thirteen officers have been impeached by the House since 1787: one President, one cabinet officer, one United States Senator, and ten Federal judges.[84] In addition there have been numerous resolutions and investigations in the House not resulting in impeachment. However, the action of the House in declining to impeach an officer is not particularly illuminating. The reasons for failing to impeach are generally not stated, and may have rested upon a failure of proof, legal insufficiency of the grounds, political judgment, the press of legislative business, or the closeness of the expiration of the session of Congress. On the other hand, when the House has voted to impeach an officer, a majority of the Members necessarily have concluded that the conduct alleged constituted grounds for impeachment.[85]

Does Article III, Section 1 of the Constitution, which states that judges "shall hold their Offices during good Behaviour," limit the relevance of the ten impeachments of judges with respect to presidential impeachment standards as has been argued by some? It does not. The argument is that "good behavior" implies an additional ground for impeachment of judges not applicable to other civil officers. However, the only impeachment provision discussed in the Convention and included in the Constitution is Article II, Section 4, which by its express terms, applies to all civil officers, including judges, and defines impeachment offenses as "Treason, Bribery, and other high Crimes and Misdemeanors."

In any event, the interpretation of the "good behavior" clause adopted by the House has not been made clear in any of the judicial impeachment cases. Whichever view is taken, the judicial impeachments have involved an assessment of the conduct of the officer in terms of the constitutional duties of his office. In this respect, the impeachments of judges are consistent with the three impeachments of non-judicial officers.

Each of the thirteen American impeachments involved charges of misconduct incompatible with the official position of the officeholder.

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[83] 1 *J. Story Commentaries on the Constitution of the United States*, § 764, at 559 (5th ed. 1905).

[84] Eleven of these officers were tried in the Senate. Articles of impeachment were presented to the Senate against a twelfth (Judge English), but he resigned shortly before the trial. The thirteenth (Judge Delahay) resigned before articles could be drawn. See Appendix B for a brief synopsis of each impeachment.

[85] Only four of the thirteen impeachments—all involving judges—have resulted in conviction in the Senate and removal from office. While conviction and removal show that the Senate agreed with the House that the charges on which conviction occurred stated legally sufficient grounds for impeachment, acquittals offer no guidance on this question, as they may have resulted from a failure of proof, other factors, or a determination by more than one third of the Senators (as in the Blount and Belknap impeachments) that trial or conviction was inappropriate for want of jurisdiction.

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This conduct falls into three broad categories: (1) exceeding the constitutional bounds of the powers of the office in derogation of the powers of another branch of government; (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper purpose or for personal gain.[56]

1. EXCEEDING THE POWERS OF THE OFFICE IN DEROGATION OF THOSE OF ANOTHER BRANCH OF GOVERNMENT

The first American impeachment, of Senator William Blount in 1797, was based on allegations that Blount attempted to incite the Creek and Cherokee Indians to attack the Spanish settlers of Florida and Louisiana, in order to capture the territory for the British. Blount was charged with engaging in a conspiracy to compromise the neutrality of the United States, in disregard of the constitutional provisions for conduct of foreign affairs. He was also charged, in effect, with attempting to oust the President's lawful appointee as principal agent for Indian affairs and replace him with a rival, thereby intruding upon the President's supervision of the executive branch.[57]

The impeachment of President Andrew Johnson in 1868 also rested on allegations that he had exceeded the power of his office and had failed to respect the prerogatives of Congress. The Johnson impeachment grew out of a bitter partisan struggle over the implementation of Reconstruction in the South following the Civil War. Johnson was charged with violation of the Tenure of Office Act, which purported to take away the President's authority to remove members of his own cabinet and specifically provided that violation would be a "high misdemeanor," as well as a crime. Believing the Act unconstitutional, Johnson removed Secretary of War Edwin M. Stanton and was impeached three days later.

Nine articles of impeachment were originally voted against Johnson, all dealing with his removal of Stanton and the appointment of a successor without the advice and consent of the Senate. The first article, for example, charged that President Johnson,

> unmindful of the high duties of this office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, order in writing the removal of Edwin M. Stanton from the office of Secretary for the Department of War.[58]

Two more articles were adopted by the House the following day. Article Ten charged that Johnson, "unmindful of the high duties of his office, and the dignity and proprieties thereof," had made inflammatory speeches that attempted to ridicule and disgrace the Congress.[59] Article Eleven charged him with attempts to prevent the

[56] A procedural note may be useful. The House votes both a resolution of impeachment against an officer and articles of impeachment containing the specific charges that will be brought to trial in the Senate. Except for the impeachment of Judge Delahay, the discussion of grounds here is based on the formal articles.

[57] After Blount had been impeached by the House, but before trial of the impeachment, the Senate expelled him for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator."

[58] Article one further alleged that Johnson's removal of Stanton was unlawful because the Senate had earlier rejected Johnson's previous suspension of him.

[59] Quoting from speeches which Johnson had made in Washington, D.C., Cleveland, Ohio

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execution of the Tenure of Office Act, an Army appropriations act, and a Reconstruction act designed by Congress "for the more efficient government of the rebel States." On its face, this article involved statutory violations, but it also reflected the underlying challenge to all of Johnson's post-war policies.

The removal of Stanton was more a catalyst for the impeachment than a fundamental cause.[29] The issue between the President and Congress was which of them should have the constitutional—and ultimately even the military—power to make and enforce Reconstruction policy in the South. The Johnson impeachment, like the British impeachments of great ministers, involved issues of state going to the heart of the constitutional division of executive and legislative power.

2. BEHAVING IN A MANNER GROSSLY INCOMPATIBLE WITH THE PROPER FUNCTION AND PURPOSE OF THE OFFICE

Judge John Pickering was impeached in 1803, largely for intoxication on the bench.[30] Three of the articles alleged errors in a trial in violation of his trust and duty as a judge; the fourth charged that Pickering, "being a man of loose morals and intemperate habits," had appeared on the bench during the trial in a state of total intoxication and had used profane language. Seventy-three years later another judge, Mark Delahay, was impeached for intoxication both on and off the bench but resigned before articles of impeachment were adopted.

A similar concern with conduct incompatible with the proper exercise of judicial office appears in the decision of the House to impeach Associate Supreme Court Justice Samuel Chase in 1804. The House alleged that Justice Chase had permitted his partisan views to influence his conduct of two trials held while he was conducting circuit court several years earlier. The first involved a Pennsylvania farmer who had led a rebellion against a Federal tax collector in 1789 and was later charged with treason. The articles of impeachment alleged that "unmindful of the solemn duties of his office, and contrary to the sacred obligation" of his oath, Chase "did conduct himself in a manner highly arbitrary, oppressive, and unjust," citing procedural rulings against the defense.

Similar language appeared in articles relating to the trial of a Virginia printer indicted under the Sedition Act of 1798. Specific examples of Chase's bias were alleged, and his conduct was characterized as "an indecent solicitude . . . for the conviction of the accused, unbecoming even a public prosecutor but highly disgraceful to the character of a judge, as it was subversive of justice." The eighth article charged that Chase, "disregarding the duties . . . of his judicial character. . . . did . . . prevent his official right and duty to address the grand jury" by delivering "an intemperate and inflammatory political harangue." His conduct was alleged to be a serious breach of his duty

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and St. Louis, Missouri, article ten pronounced these speeches "censurable in any, [and] peculiarly indecent and unbecoming in the Chief Magistrate of the United States." By means of these speeches, the article concluded, Johnson had brought the high office of the presidency "into contempt, ridicule, and disgrace, to the great scandal of all good citizens."

[29] The Judiciary Committee had reported a resolution of impeachment three months earlier charging President Johnson in its report with omissions of duty, usurpations of power, and violations of his oath of office, the laws and the Constitution in his conflict of Reconstruction. The House voted down the resolution.

[30] The issue of Pickering's insanity was raised at trial in the Senate, but was not discussed by the House when it voted to impeach or to adopt articles of impeachment.

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to judge impartially and to reflect on his competence to continue to exercise the office.

Judge West H. Humphreys was impeached in 1862 on charges that he joined the Confederacy without resigning his federal judgeship.[92] Judicial prejudice against Union supporters was also alleged.

Judicial favoritism and failure to give impartial consideration to cases before him were also among the allegations in the impeachment of Judge George W. English in 1926. The final article charged that his favoritism had created distrust of the disinterestedness of his official actions and destroyed public confidence in his court.[93]

3. EMPLOYING THE POWER OF THE OFFICE FOR AN IMPROPER PURPOSE OR PERSONAL GAIN

Two types of official conduct for improper purposes have been alleged in past impeachments. The first type involves vindictive use of their office by federal judges; the second, the use of office for personal gain.

Judge James H. Peck was impeached in 1826 for charging with contempt a lawyer who had publicly criticized one of his decisions, imprisoning him, and ordering his disbarment for 18 months. The House debated whether this single instance of vindictive abuse of power was sufficient to impeach, and decided that it was, alleging that the conduct was unjust, arbitrary, and beyond the scope of Peck's duty.

Vindictive use of power also constituted an element of the charges in two other impeachments. Judge George W. English was charged in 1926, among other things, with threatening to jail a local newspaper editor for printing a critical editorial and with summoning local officials into court in a non-existent case to harangue them. Some of the articles in the impeachment of Judge Charles Swayne (1903) alleged that he maliciously and unlawfully imprisoned two lawyers and a litigant for contempt.

Six impeachments have alleged the use of office for personal gain or the appearance of financial impropriety while in office. Secretary of War William W. Belknap was impeached in 1876 of high crimes and misdemeanors for conduct that probably constituted bribery and certainly involved the use of his office for highly improper purposes—receiving substantial annual payments through an intermediary in return for his appointing a particular post trader at a frontier military post in Indian territory.

The impeachments of Judges Charles Swayne (1903), Robert W. Archbald (1912), George W. English (1926), Harold Louderback (1932) and Halsted L. Ritter (1936) each involved charges of the use of office for direct or indirect personal monetary gain.[94] In the Archbald and Ritter cases, a number of allegations of improper conduct were combined in a single, final article, as well as being charged separately.

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[92] Although some of the language in the articles suggested treason, only high crimes and misdemeanors were alleged, and Humphrey's offenses were characterized as a failure to discharge his judicial duties.

[93] Some of the allegations against Judges Harold Louderback (1932) and Halsted Ritter (1936) also involved judicial favoritism affecting public confidence in their courts.

[94] Judge Swayne was charged with falsifying expense accounts and using a railroad car in the possession of a receiver he had appointed. Judge Archbald was charged with using his office to secure business favors from litigants and potential litigants before his court. Judges English, Louderback, and Ritter were charged with misusing their power to appoint and set the fees of bankruptcy receivers for personal profit.

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In drawing up articles of impeachment, the House has placed little emphasis on criminal conduct. Less than one-third of the eighty-three articles the House has adopted have explicitly charged the violation of a criminal statute or used the word "criminal" or "crime" to describe the conduct alleged, and ten of the articles that do were those involving the Tenure of Office Act in the impeachment of President Andrew Johnson. The House has not always used the technical language of the criminal law even when the conduct alleged fairly clearly constituted a criminal offense, as in the Humphreys and Belknap impeachments. Moreover, a number of articles, even though they may have alleged that the conduct was unlawful, do not seem to state criminal conduct—including Article Ten against President Andrew Johnson (charging inflammatory speeches), and some of the charges against all of the judges except Humphreys.

Much more common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions. Recitals that a judge has brought his court or the judicial system into disrepute are commonplace. In the impeachment of President Johnson, nine of the articles allege that he acted "unmindful of the high duties of his office and of his oath of office," and several specifically refer to his constitutional duty to take care that the laws be faithfully executed.

The formal language of an article of impeachment, however, is less significant than the nature of the allegations that it contains. All have involved charges of conduct incompatible with continued performance of the office; some have explicitly rested upon a "course of conduct" or have combined disparate charges in a single, final article. Some of the individual articles seem to have alleged conduct that, taken alone, would not have been considered serious, such as two articles in the impeachment of Justice Chase that merely alleged procedural errors at trial. In the early impeachments, the articles were not prepared until after impeachment had been voted by the House, and it seems probable that the decision to impeach was made on the basis of all the allegations viewed as a whole, rather than each separate charge. Unlike the Senate, which votes separately on each article after trial, and where conviction on but one article is required for removal from office, the House appears to have considered the individual offenses less significant than what they said together about the conduct of the official in the performance of his duties.

Two tendencies should be avoided in interpreting the American impeachments. The first is to dismiss them too readily because most have involved judges. The second is to make too much of them. They do not all fit neatly and logically into categories. That, however, is in keeping with the nature of the remedy. It is intended to reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office.

Past impeachments are not precedents to be read with an eye for an article of impeachment identical to allegations that may be currently under consideration. The American impeachment cases demonstrate a common theme useful in determining whether grounds for impeachment exist—that the grounds are derived from understanding the nature, functions and duties of the office.

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III. The Criminality Issue

The phrase "high Crimes and Misdemeanors" may connote "criminality" to some. This likely is the predicate for some of the contentions that only an indictable crime can constitute impeachable conduct. Other advocates of an indictable-offense requirement would establish a criminal standard of impeachable conduct because that standard is definite, can be known in advance and reflects a contemporary legal view of what conduct should be punished. A requirement of criminality would require resort to familiar criminal laws and concepts to serve as standards in the impeachment process. Furthermore, this would pose problems concerning the applicability of standards of proof and the like pertaining to the trial of crimes.[1]

The central issue raised by these concerns is whether requiring an indictable offense as an essential element of impeachable conduct is consistent with the purposes and intent of the framers in establishing the impeachment power and in setting a constitutional standard for the exercise of that power. This issue must be considered in light of the historical evidence of the framers' intent.[2] It is also useful to consider whether the purposes of impeachment and criminal law are such that indictable offenses can, consistent with the Constitution, be an essential element of grounds for impeachment. The impeachment of a President must occur only for reasons at least as pressing as those needs of government that give rise to the creation of criminal offenses. But this does not mean that the various elements of proof, defenses, and other substantive concepts surrounding an indictable offense control the impeachment process. Nor does it mean that state or federal criminal codes are necessarily the place to turn to provide a standard under the United States Constitution. Impeachment is a constitutional remedy. The framers intended that the impeachment language they employed should reflect the grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify impeachment.

This view is supported by the historical evidence of the constitutional meaning of the words "high Crimes and Misdemeanors." That evidence is set out above.[3] It establishes that the phrase "high Crimes and Misdemeanors"—which over a period of centuries evolved into the English standard of impeachable conduct—has a special historical meaning different from the ordinary meaning of the terms "crimes" and "misdemeanors."[4] "High misdemeanors" referred to a

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[1] See A. Simpson, *A Treatise on Federal Impeachments* 28, 29 (1916). It has also been argued that because Treason and Bribery are crimes, "other high Crimes and Misdemeanors" must refer to crimes under the *ejusdem generis* rule of construction. But *ejusdem generis* merely requires a unifying principle. The question here is whether that principle is criminality or rather conduct subversive of our constitutional institutions and form of government.

[2] The rule of construction against redundancy indicates an intent not to require criminality. If criminality is required, the word "Misdemeanors" would add nothing to "high Crimes."

[3] See part II.B, *supra*, pp. 7–17.

[4] See part II.B.2, *supra*, pp. 11–13.

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category of offenses that subverted the system of government. Since the fourteenth century the phrase "high Crimes and Misdemeanors" had been used in English impeachment cases to charge officials with a wide range of criminal and non-criminal offenses against the institutions and fundamental principles of English government.[5]

There is evidence that the framers were aware of this special, non-criminal meaning of the phrase "high Crimes and Misdemeanors" in the English law of impeachment.[6] Not only did Hamilton, a knowledge Great Britain as "the model from which [impeachment] has been borrowed," but George Mason referred in the debates to the impeachment of Warren Hastings, then pending before Parliament. Indeed, Mason, who proposed the phrase "high Crimes and Misdemeanors," expressly stated his intent to encompass "[a]ttempts to subvert the Constitution."[7]

The published records of the state ratifying conventions do not reveal an intention to limit the grounds of impeachment to criminal offenses.[8] James Iredell said in the North Carolina debates on ratification:

> . . . . the person convicted is further liable to a trial at common law, and may receive such common law punishment as belongs to a description of such offences if it be punishable by that law.[9]

Likewise, George Nicholas of Virginia distinguished disqualification to hold office from conviction for criminal conduct:

> If [the President] deviates from his duty, he is responsible to his constituents. . . . He will be absolutely disqualified to hold any place of profit, honor, or trust, and liable to further punishment if he has committed such high crimes as are punishable at common law.[10]

The post-convention statements and writings of Alexander Hamilton, James Wilson, and James Madison—each a participant in the Constitutional Convention—show that they regarded impeachment as an appropriate device to deal with offenses against constitutional government by those who hold civil office, and not a device limited to criminal offenses.[11] Hamilton, in discussing the advantages of a single rather than a plural executive, explained that a single executive gave the people "the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it."[12] Hamilton further wrote: "Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment."[13]

The American experience with impeachment, which is summarized above, reflects the principle that impeachable conduct need not be

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[5] See part II.A, *supra*, pp. 5–7.
[6] See part II.B.2, *supra*, pp. 12–13.
[7] See *Id.*, p. 11.
[8] See part II.B.3, *supra*, pp. 13–15.
[9] 4 Elliot 114.
[10] 3 Elliot 240.
[11] See part II.B.1, *supra*, p. 9; part II.B.3, *supra*, pp. 13–15, 16.
[12] *Federalist* No. 70, at 461.
[13] *Id.* at 459.

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criminal. Of the thirteen impeachments voted by the House since 1789, at least ten involved one or more allegations that did not charge a violation of criminal law.[14]

Impeachment and the criminal law serve fundamentally different purposes. Impeachment is the first step in a remedial process—removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment;[15] its function is primarily to maintain constitutional government. Furthermore, the Constitution itself provides that impeachment is no substitute for the ordinary process of criminal law since its specifies that impeachment does not immunize the officer from criminal liability for his wrongdoing.[16]

The general applicability of the criminal law also makes it inappropriate as the standard for a process applicable to a highly specific situation such as removal of a President. The criminal law sets a general standard of conduct that all must follow. It does not address itself to the abuses of presidential power. In an impeachment proceeding a President is called to account for abusing powers that only a President possesses.

Other characteristics of the criminal law make criminality inappropriate as an essential element of impeachable conduct. While the failure to act may be a crime, the traditional focus of criminal law is prohibitory. Impeachable conduct, on the other hand, may include the serious failure to discharge the affirmative duties imposed on the President by the Constitution. Unlike a criminal case, the cause for the removal of a President may be based on his entire course of conduct in office. In particular situations, it may be a course of conduct more than individual acts that has a tendency to subvert constitutional government.

To confine impeachable conduct to indictable offenses may well be to set a standard so restrictive as not to reach conduct that might adversely affect the system of government. Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law.

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[14] See Part II.C. *supra*, pp. 13–17.

[15] It has been argued that "[i]mpeachment is a special form of punishment for crime," but that gross and willful neglect of duty would be a violation of the oath of office and "[s]uch violation, by criminal acts of commission or omission, is the only nonindictable offense for which the President, Vice President, judges or other civil officers can be impeached." I. Brant, *Impeachment, Trials and Errors* 13, 20, 23 (1972). While this approach might in particular instances lead to the same results as the approach to impeachment as a constitutional remedy for action incompatible with constitutional government and the duties of constitutional office, it is, for the reasons stated in this memorandum, the latter approach that best reflects the intent of the framers and the constitutional function of impeachment. At the time the Constitution was adopted, "crime" and "punishment for crime" were terms used far more broadly than today. The seventh edition of Samuel Johnson's dictionary, published in 1785, defines "crime" as "an act contrary to right, an offense; a great fault; an act of wickedness." To the extent that the debates on the Constitution and its ratification refer to impeachment as a form of "punishment" it is punishment in the sense that today would be thought a non-criminal sanction, such as removal of a corporate officer for misconduct breaching his duties to the corporation.

[16] It is sometimes suggested that various provisions in the Constitution exempting cases of impeachment from certain provisions relating to the trial and punishment of crimes indicate an intention to require an indictable offense as an essential element of impeachable conduct. In addition to the provision referred to in the text (Article I, Section 3), cases of impeachment are exempted from the power of pardon and the right to trial by jury in Article II, Section 2 and Article III, Section 2 respectively. These provisions were placed in the Constitution in recognition that impeachable conduct *may* entail criminal conduct and to make it clear that even when criminal conduct is involved, the trial of an impeachment was not intended to be a criminal proceeding. The sources quoted at notes 8–13, *supra*, show the understanding that impeachable conduct may, but need not, involve criminal conduct.

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If criminality is to be the basic element of impeachable conduct, what is the standard of criminal conduct to be? Is it to be criminality as known to the common law, or as divined from the Federal Criminal Code, or from an amalgam of State criminal statutes? If one is to turn to State statutes, then which of those of the States is to obtain? If the present Federal Criminal Code is to be the standard, then which of its provisions are to apply? If there is to be new Federal legislation to define the criminal standard, then presumably both the Senate and the President will take part in fixing that standard. How is this to be accomplished without encroachment upon the constitutional provision that "the sole power" of impeachment is vested in the House of Representatives?

A requirement of criminality would be incompatible with the intent of the framers to provide a mechanism broad enough to maintain the integrity of constitutional government. Impeachment is a constitutional safety valve; to fulfill this function, it must be flexible enough to cope with exigencies not now foreseeable. Congress has never undertaken to define impeachable offenses in the criminal code. Even respecting bribery, which is specifically identified in the Constitution as grounds for impeachment, the federal statute establishing the criminal offense for civil officers generally was enacted over seventy-five years after the Constitutional Convention.[17]

In sum, to limit impeachable conduct to criminal offenses would be incompatible with the evidence concerning the constitutional meaning of the phrase "high Crimes and Misdemeanors" and would frustrate the purpose that the framers intended for impeachment. State and federal criminal laws are not written in order to preserve the nation against serious abuse of the presidential office. But this is the purpose of the constitutional provision for the impeachment of a President and that purpose gives meaning to "high Crimes and Misdemeanors."

[17] It appears from the annotations to the Revised Statutes of 1873 that bribery was not made a federal crime until 1790 for judges, 1853 for Members of Congress, and 1863 for other civil officers. *U.S. Rev. Stat.*, Title LXX, Ch. 6, §§ 5499-502. This consideration strongly suggests that conduct not amounting to statutory bribery may nonetheless constitute the constitutional "high Crime and Misdemeanor" of bribery.

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IV. Conclusion

Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery and other high crimes and misdemeanors). It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are "high" offenses in the sense that word was used in English impeachments.

The framers of our Constitution consciously adopted a particular phrase from the English practice to help define the constitutional grounds for removal. The content of the phrase "high Crimes and Misdemeanors" for the framers is to be related to what the framers knew, on the whole, about the English practice—the broad sweep of English constitutional history and the vital role impeachment had played in the limitation of royal prerogative and the control of abuses of ministerial and judicial power.

Impeachment was not a remote subject for the framers. Even as they labored in Philadelphia, the impeachment trial of Warren Hastings, Governor-General of India, was pending in London, a fact to which George Mason made explicit reference in the Convention. Whatever may be said on the merits of Hastings' conduct, the charges against him exemplified the central aspect of impeachment—the parliamentary effort to reach grave abuses of governmental power.

The framers understood quite clearly that the constitutional system they were creating must include some ultimate check on the conduct of the executive, particularly as they came to reject the suggested plural executive. While insistent that balance between the executive and legislative branches be maintained so that the executive would not become the creature of the legislature, dismissible at its will, the framers also recognized that some means would be needed to deal with excesses by the executive. Impeachment was familiar to them. They understood its essential constitutional functions and perceived its adaptability to the American context.

While it may be argued that some articles of impeachment have charged conduct that constituted crime and thus that criminality is an essential ingredient, or that some have charged conduct that was not criminal and thus that criminality is not essential, the fact remains that in the English practice and in several of the American impeachments the criminality issue was not raised at all. The emphasis has been on the significant effects of the conduct—undermining the integrity of office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. Clearly, these effects can be brought about in

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ways not anticipated by the criminal law. Criminal standards and criminal courts were established to control individual conduct. Impeachment was evolved by Parliament to cope with both the inadequacy of criminal standards and the impotence of courts to deal with the conduct of great public figures. It would be anomalous if the framers, having barred criminal sanctions from the impeachment remedy and limited it to removal and possible disqualification from office, intended to restrict the grounds for impeachment to conduct that was criminal.

The longing for precise criteria is understandable; advance, precise definition of objective limits would seemingly serve both to direct future conduct and to inhibit arbitrary reaction to past conduct. In private affairs the objective is the control of personal behavior, in part through the punishment of misbehavior. In general, advance definition of standards respecting private conduct works reasonably well. However, where the issue is presidential compliance with the constitutional requirements and limitations on the presidency, the crucial factor is not the intrinsic quality of behavior but the significance of its effect upon our constitutional system or the functioning of our government.

It is useful to note three major presidential duties of broad scope that are explicitly recited in the Constitution: "to take Care that the Laws be faithfully executed," to "faithfully execute the Office of President of the United States" and to "preserve, protect, and defend the Constitution of the United States" to the best of his ability. The first is directly imposed by the Constitution; the second and third are included in the constitutionally prescribed oath that the President is required to take before he enters upon the execution of his office and are, therefore, also expressly imposed by the Constitution.

The duty to take care is affirmative. So is the duty faithfully to execute the office. A President must carry out the obligations of his office diligently and in good faith. The elective character and political role of a President make it difficult to define faithful exercise of his powers in the abstract. A President must make policy and exercise discretion. This discretion necessarily is broad, especially in emergency situations, but the constitutional duties of a President impose limitations on its exercise.

The "take care" duty emphasizes the responsibility of a President for the overall conduct of the executive branch, which the Constitution vests in him alone. He must take care that the executive is so organized and operated that this duty is performed.

The duty of a President to "preserve, protect, and defend the Constitution" to the best of his ability includes the duty not to abuse his powers or transgress their limits—not to violate the rights of citizens, such as those guaranteed by the Bill of Rights, and not to act in derogation of powers vested elsewhere by the Constitution.

Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office.

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Appendixes

APPENDIX A

Proceedings of the Constitutional Convention, 1787

Selection, term and impeachment of the executive

The Convention first considered the question of removal of the executive on June 2, in Committee of the Whole in debate of the Virginia Plan for the Constitution, offered by Edmund Randolph of Virginia on May 29. Randolph's *seventh* resolution provided: "that a National Executive be instituted; to be chosen by the National Legislature for the term of [ ] years . . . and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation." [1] Randolph's *ninth* resolution provided for a national judiciary, whose inferior tribunals in the first instance and the supreme tribunal in the last resort would hear and determine (among other things) "impeachments of any National officers." (I:22)

On June 1, the Committee of the Whole debated, but postponed the question whether the executive should be a single person. It then voted, five states to four, that the term of the executive should be seven years. (I:64) In the course of the debate on this question, Gunning Bedford of Delaware, who "was strongly opposed to so long a term as seven years" and favored a triennial election with ineligibility after nine years, commented that "an impeachment would reach misfeasance only, not incapacity," and therefore would be no cure if it were found that the first magistrate "did not possess the qualifications ascribed to him, or should lose them after his appointment." (I:69)

On June 2, the Committee of the Whole agreed, eight states to two, that the executive should be elected by the national legislature. (I:77) Thereafter, John Dickenson of Delaware moved that the executive be made removable by the national legislature on the request of a majority of the legislatures of the states. It was necessary, he argued, "to place the power of removing somewhere," but he did not like the plan of impeaching the great officers of the government and wished to preserve the role of the states. Roger Sherman of Connecticut suggested that the national legislature should be empowered to remove the executive at pleasure (I:85), to which George Mason of Virginia replied that "[s]ome mode of displacing an unfit magistrate" was indispensable both because of "the fallibility of those who choose" and "the corruptibility of the man chosen." But Mason strongly opposed making the executive "the mere creature of the Legislature" as violation of the fundamental principle of good government. James Madison of Virginia and James Wilson of Pennsylvania argued against Dickenson's motion because it would put small states on an

[1] 1 *The Records of the Federal Convention* 21 (M. Farrand ed. 1911). All references hereafter in this appendix are given parenthetically in the text and refer to the volume and page of Farrand (e.g., I:21).

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equal basis with large ones and "enable a minority of the people to prevent ye removal of an officer who had rendered himself justly criminal in the eyes of a majority; open the door for intrigues against him in states where his administration, though just, was unpopular; and tempt him to pay court to particular states whose partisans he feared or wished to engage in his behalf. (I:86) Dickenson's motion was rejected, with only Delaware voting for it. (I:87).

The Committee of the Whole then voted, seven states to two, that the executive should be made ineligible after seven years (I:88).

On motion of Hugh Williamson of North Carolina, the Committee agreed, apparently without debate, to add the clause "and to be removable on impeachment & conviction of mal-practice or neglect of duty." (I:88)

SINGLE EXECUTIVE

The Committee then returned to the question whether there should be a single executive. Edmund Randolph argued for a plural executive, primarily because "the permanent temper of the people was adverse to the very semblance of Monarchy." (I:88) (He had said on June 1, when the question was first discussed, that he regarded a unity in the executive as "the foetus of monarchy." (I:66)). On June 4, the Committee resumed debate of the issue, with James Wilson making the major argument in favor of a single executive. The motion for a single executive was agreed to, seven states to three. (I:97).

George Mason of Virginia was absent when the vote was taken; he returned during debate on giving the executive veto power over legislative acts. In arguing against the executive's appointment and veto power, he commented that the Convention was constituting "a more dangerous monarchy" than the British government, "an elective one." (I:101). He never could agree, he said "to give up all the rights of the people to a single Magistrate. If more than one had been fixed on, greater powers might have been entrusted to the Executive"; and he hoped that the attempt to give such powers would have weight later as an argument for a plural executive. (I:102).

On June 13, the Committee of the Whole reported its actions on Randolph's propositions to the Convention. (I:228–32) On June 15, William Patterson of New Jersey proposed his plan as an alternative. Patterson's resolution called for a federal executive elected by Congress, consisting of an unstated number of persons, to serve for an undesignated term and to be ineligible for a second term, removable by Congress on application by a majority of the executives of the states. The major purpose of the Patterson plan was to preserve the equality of state representation provided in the Articles of Confederation, and it was on this issue that it was rejected. (I:242–45) The Randolph resolutions called for representation on the basis of population in both houses of the legislature. (I:229–30) The Patterson resolution was debated in the Committee of the Whole on June 16, 18, and 19. The Committee agreed seven states to three, to re-report Randolph's resolutions as amended, thereby adhering to them in preference to Patterson's. (I:322)

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SELECTION OF THE EXECUTIVE

On July 17, the Convention began debate on Randolph's ninth resolution as amended and reported by the Committee of the Whole. The consideration by the Convention of the resolution began with unanimous agreement that the executive should consist of a single person. (II:29) The Convention then turned to the mode of election. It voted against election by the people instead of the legislature, proposed by Gouverneur Morris of Pennsylvania, one state to nine. (II:32) Gouverneur Morris had argued that if the executive were appointed and impeachable by the legislature, he "will be the mere creature" of the legislature (II:29), a view which James Wilson reiterated, adding that "it was notorious" that the power of appointment to great offices "was most corruptly managed of any that had been committed to legislative bodies." (II:32)

Luther Martin of Maryland then proposed that the executive be chosen by electors appointed by state legislators, which was rejected eight states to two, and election by the legislature was passed unanimously. (II:32)

TERM OF THE EXECUTIVE

The Convention voted six states to four to strike the clause making the President ineligible for reelection. In support of reeligibility, Gouverneur Morris argued that ineligibility "tended to destroy the great motive to good behaviour, the hope of being rewarded by a re-appointment. It was saying to him, make hay while the sun shines." (II:33)

The question of the President's term was then considered. A motion to strike the seven year term and insert "during good behavior" failed by a vote of four states to six. (II:36) In his Journal of the Proceedings, James Madison suggests that the "probable object of this motion was merely to enforce the argument against re-eligibility of the Executive Magistrate, by holding out a tenure during good behavior as the alternative for keeping him independent of the Legislature." (II:33) After this vote, and a vote not to strike seven years, it was unanimously agreed to reconsider the question of the executive's re-eligibility. (II:36)

JURISDICTION OF JUDICIARY TO TRY IMPEACHMENTS

On July 18, the Convention considered the resolution dealing with the Judiciary. The mode of appointing judges was debated. George Mason suggesting that this question "may depend in some degree on the mode of trying impeachments, of the Executive." If the judges were to try the executive, Mason contended, they surely ought not be appointed by him. Mason opposed executive appointment; Gouverneur Morris, who favored it, agreed that it would be improper for the judges to try an impeachment of the executive, but suggested that this was not an argument against their appointment by the executive. (II: 41–42) Ultimately, after the Convention divided evenly on a

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proposal for appointment by the Executive with advice and consent of the second branch of the legislature, the question was postponed. (II : 44) The Convention did, however, unanimously agree to strike the language giving the judiciary jurisdiction of "impeachments of national officers." (II : 46)

REELECTION OF THE EXECUTIVE

On July 19, the Convention again considered the eligibility of the executive for reelection. (II : 51) The debate on this issue reintroduced the question of the mode of election of the executive, and it was unanimously agreed to reconsider generally the constitution of the executive. The debate suggests the extent of the delegates' concern about the independence of the executive from the legislature. Gouverneur Morris, who favored reeligibility, said:

> One great object of the Executive is to controul the Legislature. The Legislature will continually seek to aggrandize & perpetuate themselves: and will seize those critical moments produced by war, invasion or convulsion for that purpose. It is necessary then that the Executive Magistrate should be the guardian of the people, even of the lower classes, agst. Legislative tyranny.... (II : 52)

The ineligibility of the executive for reelection, he argued, "will destroy the great incitement to merit public esteem by taking away the hope of being rewarded with a reappointment. . . . It will tempt him to make the most of the Short space of time allotted him, to accumulate wealth and provide for his friends. . . . It will produce violations of the very Constitution it is meant to secure," as in moments of pressing danger an executive will be kept on despite the forms of the Constitution. And Morris described the impeachability of the executive as "a dangerous part of the plan. It will hold him in such dependence that he will be no check on the Legislature, will not be a firm guardian of the people and of the public interest. He will be the tool of a faction, of some leading demagogue in the Legislature." (II : 53)

Morris proposed a popularly elected executive, serving for a two year term, eligible for reelection, and not subject to impeachment. He did "not regard . . . as formidable" the danger of his unimpeachability:

> There must be certain great officers of State: a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive, and will be amenable by impeachment to the public Justice. Without these ministers the Executive can do nothing of consequence. (II :53–54)

The remarks of other delegates also focused on the relationship between appointment by the legislature and reeligibility, and James Wilson remarked that "the unanimous sense" seemed to be that the executive should not be appointed by the legislature unless he was ineligible for a second time. As Elbridge Gerry of Massachusetts remarked, "[Making the executive eligible for reappointment] would make him absolutely dependent." (II :57) Wilson argued for popular election, and Gerry for appointment by electors chosen by the state executives.

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SELECTION, REELECTION AND TERM OF THE EXECUTIVE

Upon reconsidering the mode of appointment, the Convention voted six States to three for appointment by electors and eight States to two that the electors should be chosen by State legislatures. (The ratio of electors among the States was postponed.) It then voted eight States to two against the executive's ineligibility for a second term. (II:58) A seven-year term was rejected, three States to five; and a six-year term adopted, nine States to one (II:58–59).

IMPEACHMENT OF THE EXECUTIVE

On July 20, the Convention voted on the number of electors for the first election and on the apportionment of electors thereafter. (II:63) It then turned to the provision for removal of the executive on impeachment and conviction for "mal-practice or neglect of duty." After debate, it was agreed to retain the impeachment provision, eight states to two. (II:69) This was the only time during the Convention that the purpose of impeachment was specifically addressed.

Charles Pinckney of South Carolina and Gouverneur Morris moved to strike the impeachment clause, Pinckney observing that the executive "[ought not to] be impeachable whilst in office." (A number of State constitutions then provided for impeachment of the executive only after he had left office.) James Wilson and William Davie of North Carolina argued that the executive should be impeachable while in office, Davie commenting:

> If he be not impeachable whilst in office, he will spare no efforts or means whatever to get himself re-elected.

Davie called his impeachability while in office "an essential security for the good behaviour of the Executive." (II:64)

Gouverneur Morris, reiterating his previous argument, contended that the executive "can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence." He also questioned whether impeachment would result in suspension of the executive. If it did not, "the mischief will go on"; if it did, "the impeachment will be nearly equivalent to a displacement, and will render the Executive dependent on those who are to impeach." (II:64–65)

As the debate proceeded, however, Gouverneur Morris changed his mind. During the debate, he admitted "corruption & some few other offenses to be such as ought to be impeachable," but he thought they should be enumerated and defined. (II:65) By the end of the discussion, he was, he said, "now sensible of the necessity of impeachments, if the Executive was to continue for any time in office." He cited the possibility that the executive might "be bribed by a greater interest to betray his trust." (II:68) While one would think the King of England well secured against bribery, since "[h]e has as it were a fee simple in the whole Kingdom," yet, said Morris, "Charles II was bribed by Louis XIV. The Executive ought therefore to be impeachable for treachery." (II:68–69) Other causes of impeachment were "[c]orrupting his electors" and "incapacity," for which "he should be punished not as a man, but as an officer, and punished only by degradation from his office." Morris concluded: "This Magistrate is not the King

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but the prime-Minister. The people are the King." He added that care should be taken to provide a mode for making him amenable to justice that would not make him dependent on the legislature. (II:69)

George Mason of Virginia was a strong advocate of the impeachability of the executive; no point, he said, "is of more importance than that the right of impeachment should be continued":

> Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice? When great crimes were committed he was for punishing the principal as well as the Coadjutors.

(This comment was in direct response to Gouverneur Morris's original contention that the executive could "do no criminal act without Coadjutors who may be punished.") Mason went on to say that he favored election of the executive by the legislature, and that one objection to electors was the danger of their being corrupted by the candidates. This, he said, "furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?" (II:65)

Benjamin Franklin supported impeachment as "favorable to the Executive." At a time when first magistrates could not formally be brought to justice, "where the chief Magistrate rendered himself obnoxious. . . . recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character." It was best to provide in the Constitution "for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused." (II:65)

James Madison argued that it was "indispensable that some provision should be made for defending the Community agst the incapacity, negligence or perfidy of the chief Magistrate." A limited term "was not a sufficient security. He might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers." (II:65–66) It could not be presumed that all or a majority of a legislative body would lose their capacity to discharge their trust or be bribed to betray it, and the difficulty of acting in concert for purposes of corruption provided a security in their case. But in the case of the Executive to be administered by one man, "loss of capacity or corruption was more within the compass of probable events, and either of them might be fatal to the Republic." (II:66)

Charles Pinckney reasserted that he did not see the necessity of impeachments and that he was sure "they ought not to issue from the Legislature who would . . . hold them as a rod over the Executive and by that means effectually destroy his independence," rendering his legislative revisionary power in particular altogether insignificant. (II:66)

Elbridge Gerry argued for impeachment as a deterrent: "A good magistrate will not fear them. A bad one ought to be kept in fear of them." He hoped that the maxim that the chief magistrate could do no wrong "would never be adopted here." (II:66)

Rufus King argued against impeachment from the principle of the separation of powers. The judiciary, it was said, would be impeach-

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able, but that was because they held their place during good behavior and "[i]t is necessary therefore that a forum should be established for trying misbehaviour." (II:66) The executive, like the legislature and the Senate in particular, would hold office for a limited term of six years; "he would periodically be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it." Like legislators, therefore, "he ought to be subject to no intermediate trial, by impeachment." (II:67) Impeachment is proper to secure good behavior of those holding their office for life: it is unnecessary for any officer who is elected for a limited term, "the periodical responsibility to the electors being an equivalent security." (II:68)

King also suggested that it would be "most agreeable to him" if the executive's tenure in office were good behaviour; and impeachment would be appropriate in this case, "provided an independent and effectual forum could be advised." He should not be impeachable by the legislature, for this "would be destructive of his independence and of the principles of the Constitution." (II:67)

Edmund Randolph agreed that it was necessary to proceed "with a cautious hand" and to exclude "as much as possible the influence of the Legislature from the business." He favored impeachment, however:

> The propriety of impeachments was a favorite principle with him; Guilt wherever found ought to be punished. The Executive will have great opportunitys of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided, it will be irregularly inflicted by tumults & insurrections. (II:67)

Charles Pinckney rejoined that the powers of the Executive "would be so circumscribed as to render impeachment unnecessary," (II:68)

SELECTION OF THE EXECUTIVE

On July 24, the decision to have electors choose the executive was reconsidered, and the national legislature was again substituted, seven states to four. (II:101) It was then moved to reinstate the one-term limitation, which led to discussion and motions with respect to the length of his term—eleven years, fifteen years, twenty years ("the medium life of princes"—a suggestion possibly meant, according to Madison's journal, "as a caricature of the previous motions"), and eight years were offered. (II:102) James Wilson proposed election for a term of six years by a small number of members of the legislature selected by lot. (II:103) The election of the executive was unanimously postponed. (II:106) On July 25, the Convention rejected, four states to seven, a proposal for appointment by the legislature unless the incumbent were reeligible in which case the choice would be made by electors appointed by the state legislatures. (II:111) It then rejected, five states to six, Pinckney's proposal for election by the legislature, with no person eligible for more than six years in any twelve. (II:115)

The debate continued on the 26th, and George Mason suggested reinstituting the original mode of election and term reported by the Committee of the Whole (appointment by the legislature, a seven-year term, with no reeligibility for a second term). (II:118–19) This was

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agreed to, seven states to three. (II:120) The entire resolution on the executive was then adopted (six states to three) and referred to a five member Committee on Detail to prepare a draft Constitution. (II:121)

PROVISIONS IN THE DRAFT OF AUGUST 6

The Committee on Detail reported a draft on August 6. It included the following provisions with respect to impeachment:

> The House of Representatives shall have the sole power of impeachment. (Art. IV, sec. 6)
>
> [The President] shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of an impeachment. . . . He [The President] shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption. (Art. X, sec. 2)
>
> The Jurisdiction of the Supreme Court shall extend . . . to the trial of impeachments of Officers of the United States. . . . In cases of impeachment . . . this jurisdiction shall be original. . . . The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) . . . to . . . Inferior Courts. . . . (Art. XI, sec. 3)
>
> The trial of all criminal offences (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury. (Art. XI, sec. 4)
>
> Judgment, in cases of Impeachment, shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honour, trust, or profit, under the United States. But the party convicted shall, nevertheless be liable and subject to indictment, trial, judgment and punishment according to law. (Art. XI, sec. 5) (II: 178–79, 185–87)

The draft provided, with respect to the executive:

> The Executive Power of the United States shall be vested in a single person. His stile shall be "The President of the United States of America;" and his title shall be, "His Excellency". He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time. (Art. X, sec. 1) (II: 185)

Article IV, section 6 was unanimously agreed to by the Convention on August 9. (II: 231) On August 22, a prohibition of bills of attainder and ex post facto laws was voted, the first unanimously and the second seven states to three. (II: 376) On August 24, the Convention considered Article X, dealing with the Executive. It unanimously approved vesting the power in a single person. (II: 401) It rejected, nine states to two, a motion for election "by the people" rather than by the Legislature. (II:402) It then amended the provision to provide for "joint ballot" (seven states to four), rejected each state having one vote (five states to six), and added language requiring a majority of the votes of the members present for election (ten states to one). (II:403) Gouverneur Morris proposed election by "Electors to be chosen by the people of the several States," which failed five states

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to six; then a vote on the "abstract question" of selection by electors failed, the States being evenly divided (four states for, four opposed, two divided, and Massachusetts absent). (II: 404)

On August 25, the clause giving the President pardon power was unanimously amended so that cases of impeachment were excepted, rather than a pardon not being pleadable in bar of impeachment. (II: 419–20)

On August 27, the impeachment provision of Article X was unanimously postponed at the instance of Gouverneur Morris, who thought the Supreme Court an improper tribunal. (II: 427) A proposal to make judges removable by the Executive on the application of the Senate and House was rejected, one state to seven. (II: 429)

EXTRADITION: "HIGH MISDEMEANOR"

On August 28, the Convention unanimously amended the extradition clause, which referred to any person "charged with treason, felony or high misdemeanor in any State, who shall flee from justice" to strike "high misdemeanor" and insert "other crime." The change was made "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." (II: 443)

FORUM FOR TRIAL OF IMPEACHMENTS

On August 31, those parts of the Constitution that had been postponed were referred to a committee with one member from each state—the Committee of Eleven. (II: 473) On September 4, the Committee reported to the Convention. It proposed that the Senate have power to try all impeachments, with concurrence of two-thirds of the members present required for a person to be convicted. The provisions concerning election of the President and his term in office were essentially what was finally adopted in the Constitution, except that the Senate was given the power to choose among the five receiving the most electoral votes if none had a majority. (II: 496–99) The office of Vice President was created, and it was provided that he should be ex officio President of the Senate "except when they sit to try the impeachment of the President, in which case the Chief Justice shall preside." (II:498) The provision for impeachment of the President was amended to delete "corruption" as a ground for removal, reading:

> He shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason, or bribery. . . . (II:499)

The Convention postponed the Committee's provision making the Senate the tribunal for impeachments "in order to decide previously on the mode of electing the President." (II:499)

SELECTION OF THE PRESIDENT

Gouverneur Morris explained "the reasons of the Committee and his own" for the mode of election of the President:

> The 1st was the danger of intrigue & faction if the appointmt. should be made by the Legislature. 2 the inconvenience of an ineligibility required by that mode in order to lessen its evils.

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3 The difficulty of establishing a Court of Impeachments, other than the Senate which would not be so proper for the trial nor the other branch for the impeachment of the President, if appointed by the Legislature. 4 No body had appeared to be satisfied with an appointment by the Legislature. 5. Many were anxious even for an immediate choice by the people—6—the indispensible necessity of making the Executive independent of the Legislature. (II:500)

The "great evil of cabal was avoided" because the electors would vote at the same time throughout the country at a great distance from each other; "[i]t would be impossible also to corrupt them." A conclusive reason, said Gouverneur Morris, for having the Senate the judge of impeachments rather than the Supreme Court was that the Court "was to try the President after the trial of the impeachment." (II:500) Objections were made that the Senate would almost always choose the President. Charles Pinckney asserted, "It makes the same body of men which will in fact elect the President his Judges in case of an impeachment." (II:501) James Wilson and Edmund Randolph suggested that the eventual selection should be referred to the whole legislature, not just the Senate; Gouverneur Morris responded that the Senate was preferred "because fewer could then, say to the President, you owe your appointment to us. He thought the President would not depend so much on the Senate for his re-appointment as on his general good conduct." (II:502) Further consideration on the report was postponed until the following day.

On September 5 and 6, a substantial number of amendments were proposed. The most important, adopted by a vote of ten states to one, provided that the House, rather than the Senate, should choose in the event no person received a majority of the electoral votes, with the representation from each state having one vote, and a quorum of two-thirds of the states being required. (II:527–28) This amendment was supported as "lessening the aristocratic influence of the Senate," in the words of George Mason. Earlier, James Wilson had criticized the report of the Committee of Eleven as "having a dangerous tendency to aristocracy; as throwing a dangerous power into the hands of the Senate," who would have, in fact, the appointment of the President, and through his dependence on them the virtual appointment to other offices (including the judiciary), would make treaties, and would try all impeachments. "[T]he Legislative, Executive & Judiciary powers are all blended in one branch of the Government. . . . [T]he President will not be the man of the people as he ought to be, but the Minion of the Senate." (II:522–23)

ADOPTION OF "HIGH CRIMES AND MISDEMEANORS"

On September 8, the Convention considered the clause referring to impeachment and removal of the President for treason and bribery. George Mason asked, "Why is the provision restrained to Treason & bribery only?" Treason as defined by the Constitution, he said, "will not reach many great and dangerous offenses. . . . Attempts to subvert the Constitution may not be Treason . . ." Not only was treason limited, but it was "the more necessary to extend: the power of impeachments" because bills of attainder were forbidden. Mason moved to add "maladministration" after "bribery". (II:550)

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James Madison commented, "So vague a term will be equivalent to a tenure during pleasure of the Senate," and Mason withdrew "maladministration" and substituted "high crimes & misdemeanors . . . agst. the State" This term was adopted, eight states to three. (II: 550)

TRIAL OF IMPEACHMENTS BY THE SENATE

Madison then objected to trial of the President by the Senate and after discussion moved to strike the provision, stating a preference for a tribunal of which the Supreme Court formed a part. He objected to trial by the Senate, "especially as [the President] was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemeanor. The President under these circumstances was made improperly dependent." (II: 551)

Gouverneur Morris (who had said of "maladministration" that it would "not be put in force and can do no harm"; an election every four years would "prevent maladministration" II: 550) argued that no tribunal other than the Senate could be trusted. The Supreme Court, he said, "were too few in number and might be warped or corrupted." He was against a dependence of the executive on the legislature, and considered legislative tyranny the great danger. But, he argued, "there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out." (II: 551)

Charles Pinckney opposed the Senate as the court of impeachments because it would make the President too dependent on the legislature. "If he opposes a favorite law, the two Houses will combine against him, and under the influence of heat and faction throws him out of office." Hugh Williamson of North Carolina replied that there was "more danger of too much lenity than of too much rigour towards the President," considering the number of respects in which the Senate was associated with the President. (II: 51)

After Madison's motion to strike out the provision for trial by the Senate failed, it was unanimously agreed to strike "State" and insert "United States" after "misdemeanors against," "in order to remove ambiguity." (II:551) It was then agreed to add: "The vice-President and other Civil officers of the U.S. shall be removed from office on impeachment and conviction as aforesaid."

Gouverneur Morris moved to add a requirement that members of the Senate would be on oath in an impeachment trial, which was agreed to, and the Convention then voted, nine states to two, to agree to the clause for trial by the Senate. (II: 552–53)

COMMITTEE ON STYLE AND ARRANGEMENT

A five member Committee on Style and Arrangement was appointed by ballot to arrange and revise the language of the articles agreed to by the Convention. (II:553) The Committee reported a draft on September 12. The Committee, which made numerous changes to shorten and tighten the language of the Constitution, had dropped the expression "against the United States" from the description of grounds for impeachment, so the clause read, "The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high Crimes and Misdemeanors." (II: 600)

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SUSPENSION UPON IMPEACHMENT

On September 14, John Rutledge and Gouverneur Morris moved "that persons impeached be suspended from their office until they be tried and acquitted. (II: 612) Madison objected that the President was already made too dependent on the legislature by the power of one branch to try him in consequence of an impeachment by the other. Suspension he argued, "will put him in the power of one branch only," which can at any moment vote a temporary removal of the President in order "to make way for the functions of another who will be more favorable to their views." The motion was defeated, three states to eight. (II: 613).

No further changes were made with respect to the impeachment provision or the election of the President. On September 15, the Constitution was agreed to, and on September 17 it was signed and the Convention adjourned. (II: 650)

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APPENDIX B

American Impeachment Cases

1. SENATOR WILLIAM BLOUNT (1797–1799)

a. Proceedings in the House

The House adopted a resolution in 1797 authorizing a select committee to examine a presidential message and accompanying papers regarding the conduct of Senator Blount.[1] The committee reported a resolution that Blount "be impeached for high crimes and misdemeanors," which was adopted without debate or division.[2]

b. Articles of Impeachment

Five articles of impeachment were agreed to by the House without amendment (except a "mere verbal one").[3]

Article I charged that Blount, knowing that the United States was at peace with Spain and that Spain and Great Britain were at war with each other, "but disregarding the duties and obligations of his high station, and designing and intending to disturb the peace and tranquillity of the United States, and to violate and infringe the neutrality thereof," conspired and contrived to promote a hostile military expedition against the Spanish possessions of Louisiana and Florida for the purpose of wresting them from Spain and conquering them for Great Britain. This was alleged to be "contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof."

Article II charged that Blount knowing of a treaty between the United States and Spain and "disregarding his high station, and the stipulations of the . . . treaty, and the obligations of neutrality," conspired to engage the Creek and Cherokee nations in the expedition against Louisiana and Florida. This was alleged to be contrary to Blount's duty of trust and station as a Senator, in violation of the treaty and of the obligations of neutrality, and against the laws, peace, and interest of the United States.

Article III alleged that Blount, knowing that the President was empowered by act of Congress to appoint temporary agents to reside among the Indians in order to secure the continuance of their friendship and that the President had appointed a principal temporary agent, "in the prosecution of his criminal designs and of his conspiracies" conspired and contrived to alienate the tribes from the President's agent and to diminish and impair his influence with the tribes, "contrary to the duty of his trust and station as a Senator and the peace and interests of the United States."

[1] 5 Annals of Cong. 440–41 (1797).
[2] *Id.* 459.
[3] *Id.* 951.

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Article IV charged that Blount, knowing that the Congress had made it lawful for the President to establish trading posts with the Indians and that the President had appointed an interpreter to serve as assistant post trader, conspired and contrived to seduce the interpreter from his duty and trust and to engage him in the promotion and execution of Blount's criminal intentions and conspiracies, contrary to the duty of his trust and station as a Senator and against the laws, treaties, peace and interest of the United States.

Article V charged that Blount, knowing of the boundary line between the United States and the Cherokee nation established by treaty, in further prosecution of his criminal designs and conspiracies and the more effectually to accomplish his intention of exciting the Cherokees to commence hostilities against Spain, conspired and contrived to diminish and impair the confidence of the Cherokee nation in the government of the United States and to create discontent and disaffection among the Cherokees in relation to the boundary line. This was alleged to be against Blount's duty and trust as a Senator and against impeachment was dismissed.

c. Proceedings in the Senate

Before Blount's impeachment, the Senate had expelled him for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator." [4] At the trial a plea was interposed on behalf of Blount to the effect that (1) a Senator was not a "civil officer," (2) having already been expelled, Blount was no longer impeachable, and (3) no crime or misdemeanor in the execution of the office had been alleged. The Senate voted 14 to 11 that the plea was sufficient in law that the Senate ought not to hold jurisdiction.[5] The impeachment was dismissed.

2. DISTRICT JUDGE JOHN PICKERING (1803–1804)

a. Proceedings in the House

A message received from the President of the United States, regarding complaints against Judge Pickering, was referred to a select committee for investigation in 1803.[6] A resolution that Pickering be impeached "of high crimes and misdemeanors" was reported to the full House the same year and adopted by a vote of 45 to 8.[7]

b. Articles of Impeachment

A select committee was appointed to draft articles of impeachment.[8] The House agreed unanimously and without amendment to the four articles subsequently reported.[9] Each article alleged high crimes and misdemeanors by Pickering in his conduct of an admiralty proceeding by the United States against a ship and merchandise that allegedly had been landed without the payment of duties.

Article I charged that Judge Pickering, "not regarding, but with intent to evade" an act of Congress, had ordered the ship and merchandise delivered to its owner without the production of any certifi-

[4] *Id.* 43–44.
[5] *Id.* 2319 (1799).
[6] 12 ANNALS OF CONG. 460 (1803).
[7] *Id.* 642.
[8] 13 ANNALS OF CONG. 380 (1803).
[9] *Id.* 794–95.

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cate that the duty on the ship or the merchandise had been paid or secured, "contrary to [Pickering's] trust and duty as judge . . ., and to the manifest injury of [the] revenue."[10]

Article II charged that Pickering, "with intent to defeat the just claims of the United States," refused to hear the testimony of witnesses produced on behalf of the United States and, without hearing testimony, ordered the ship and merchandise restored to the claimant "contrary to his trust and duty, as judge of the said district court, in violation of the laws of the United States, and to the manifest injury of their revenue."[11]

Article III charged that Pickering, "disregarding the authority of the laws, and wickedly meaning and intending to injure the revenues of the United States, and thereby to impair the public credit, did absolutely and positively refuse to allow" the appeal of the United States on the admiralty proceedings, "contrary to his trust and duty as judge of the said district court, against the laws of the United States, to the great injury of the public revenue, and in violation of the solemn oath which he had taken to administer equal and impartial justice."[12]

Article IV charged:

> That whereas for the due, faithful, and impartial administration of justice, temperance and sobriety are essential qualities in the character of a judge, yet the said John Pickering, being a man of loose morals and intemperate habits, . . . did appear upon the bench of the said court, for the purpose of administering justice [on the same dates as the conduct charged in articles I–III], in a state of total intoxication, . . . and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens of the United States, and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge, and degrading to the honor and dignity of the United States.[13]

c. Proceedings in the Senate

The Senate convicted Judge Pickering on each of the four articles by a vote of 19 to 7.[14]

d. Miscellaneous

The Senate heard evidence on the issue of Judge Pickering's sanity, but refused by a vote of 19 to 9 to postpone the trial.[15]

3. JUSTICE SAMUEL CHASE (1804–1805)

a. Proceedings in the House

In 1804 the House authorized a committee to inquire into the conduct of Supreme Court Justice Chase.[16] On the same day that Judge Pickering was convicted in the Senate, the House adopted by a vote of

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[10] *Id.* 319.
[11] *Id.* 320–21.
[12] *Id.* 321–22.
[13] *Id.* 322.
[14] *Id.* 366–67.
[15] *Id.* 362–63.
[16] *Id.* 875.

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73 to 32 a resolution reported by the committee that Chase be impeached of "high crimes and misdemeanors."[17]

b. Articles of Impeachment

After voting separately on each, the House adopted eight articles.[18]

Article I charged that, "unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them 'faithfully and impartially, and without respect to persons' [a quotation from the judicial oath prescribed by statute]," Chase, in presiding over a treason trial in 1800, "did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust" by:

(1) delivering a written opinion on the applicable legal definition of treason before the defendant's counsel had been heard;

(2) preventing counsel from citing certain English cases and U.S. statutes; and

(3) depriving the defendant of his constitutional privilege to argue the law to the jury and "endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law, as well as the question of fact" in reaching their verdict.

In consequence of this "irregular conduct" by Chase, the defendant was deprived of his Sixth Amendment rights and was condemned to death without having been represented by counsel "to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which ultimately, rest the liberty and safety of the people." [19]

Article II charged that, "prompted by a similar spirit of persecution and injustice," Chase had presided over a trial in 1800 involving a violation of the Sedition Act of 1798 (for defamation of the President, and, "with intent to oppress and procure the conviction" of the defendant, allowed an individual to serve on the jury who wished to be excused because he had made up his mind as to whether the publication involved was libelous.[20]

Article III charged that, "with intent to oppress and procure the conviction" of the defendant in the Sedition Act prosecution, Chase refused to permit a witness for the defendant to testify "on pretense that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact." [21]

Article IV charged that Chase's conduct throughout the trial was "marked by manifest injustice, partiality, and intemperance":

> (1) in compelling defendant's counsel to reduce to writing for the court's inspection the questions they wished to ask the witness referred to in article III;
>
> (2) in refusing to postpone the trial although an affidavit had been filed stating the absence of material witnesses on behalf of the defendant;
>
> (3) in using "unusual, rude and contemptuous expressions" to defendant's counsel and in "falsely insinuating" that they wished

[17] *Id.* 1180.
[18] 14 ANNALS OF CONG. 747–62 (1804).
[19] *Id.* 728–29.
[20] *Id.* 729.
[21] *Id.*

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to excite public fears and indignation and "to produce that insubordination to law to which the conduct of the judge did, at the same time, manifestly tend";

(4) in "repeated and vexatious interruptions of defendant's counsel, which induced them to withdraw from the case"; and

(5) in manifesting "an indecent solicitude" for the defendant's conviction, "unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice." [22]

Article V charged that Chase had issued a bench warrant rather than a summons in the libel case, contrary to law.[23]

Article VI charged that Chase refused a continuance of the libel trial to the next term of court, contrary to law and "with intent to oppress and procure the conviction" of the defendant.[24]

Article VII charged that Chase, "disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer" by refusing to discharge a grand jury and by charging it to investigate a printer for sedition, with intention to procure the prosecution of the printer, "thereby degrading his high judicial functions and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare." [25]

Article VIII charged that Chase, "disregarding the duties and dignity of his judicial character," did "pervert his official right and duty to address" a grand jury by delivering "an intemperate and inflammatory political harangue with intent to excite the fears and resentment" of the grand jury and the people of Maryland against their state government and constitution, "a conduct highly censurable in any, but peculiarly indecent and unbecoming" in a Justice of the Supreme Court. This article also charged that Chase endeavored "to excite the odium" of the grand jury and the people of Maryland against the government of the United States "by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion and in a proper manner, were at that time, and as delivered by him, highly indecent, extra-judicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partisan." [26]

c. Proceedings in the Senate

Justice Chase was acquitted on each article by votes ranging from 0–34 not guilty on Article V to 19–15 guilty on Article VIII.[27]

4. DISTRICT JUDGE JAMES H. PECK (1830–1831)

a. Proceedings in the House

The House adopted a resolution in 1830 authorizing an inquiry respecting District Judge Peck.[28] The Judiciary Committee reported a resolution that Peck "be impeached of high misdemeanors in office" to the House, which adopted it by a vote of 123 to 49.[29]

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[22] *Id.* 729–30.
[23] *Id.* 730.
[24] *Id.*
[25] *Id.* 730–31.
[26] *Id.* 731.
[27] *Id.* 665–69 (1805).
[28] H.R. JOUR., 21st Cong., 1st Sess. 138 (1830).
[29] 6 CONG. DEB. 819 (1830).

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b. Article of Impeachment

After the House voted in favor of impeachment, a committee was appointed to prepare articles. The single article proposed and finally adopted by the House charged that Peck, "unmindful of the solemn duties of his station," and "with interest in wrongfully and unjustly to oppress, imprison, and otherwise injure" an attorney who had published a newspaper article criticizing one of the judge's opinions, had brought the attorney before the court and, under "the color and pretences" of a contempt proceeding, had caused the attorney to be imprisoned briefly and suspended from practice for eighteen months. The House charged that Peck's conduct resulted in "the great disparagement of public justice, the abuse of judicial authority, and . . . the subversion of the liberties of the people of the United States."[30]

c. Proceedings in the Senate

The trial in the Senate focused on two issues. One issue was whether Peck, by punishing the attorney for writing a newspaper article, had exceeded the limits of judicial contempt power under Section 17 of the Judiciary Act of 1789. The other contested issue was the requirement of proving wrongful intent.

Judge Peck was acquitted on the single article with twenty-one Senators voting in favor of conviction and twenty-two Senators against.[31]

5. DISTRICT JUDGE WEST H. HUMPHREYS (1862)

a. Proceedings in the House

A resolution authorizing an inquiry by the Judiciary Committee respecting District Judge Humphreys was adopted in 1862.[32] Humphreys was subsequently impeached at the recommendation of the investigating committee.[33]

b. Articles of Impeachment

Soon after the adoption of the impeachment resolution, seven articles of impeachment were agreed to by the House without debate.[34]

Article I charged that in disregard of his "duties as a citizen . . . and unmindful of the duties of his . . . office" as a judge, Humphreys "endeavor[ed] by public speech to incite revolt and rebellion" against the United States; and publicly declared that the people of Tennessee had the right to absolve themselves of allegiance to the United States.

Article II charged that, disregarding his duties as a citizen, his obligations as a judge, and the "good behavior" clause of the Constitution, Humphreys advocated and agreed to Tennessee's ordinance of secession.

Article III charged that Humphreys organized armed rebellion against the United States and waged war against them.

Article IV charged Humphreys with conspiracy to violate a civil war statute that made it a criminal offense "to oppose by force the authority of the Government of the United States."

[30] *Id.* 869. For text of article, see H.R. Jour., 21st Cong., 1st Sess. 591–96 (1830).
[31] 7 Cong. Deb. 45 (1831).
[32] Cong. Globe, 37th Cong., 2d Sess. 229 (1862).
[33] *Id.* 1966–67.
[34] *Id.* 2205.

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Article V charged that, with intent to prevent the administration of the laws of the United States and to overthrow the authority of the United States, Humphreys had failed to perform his federal judicial duties for nearly a year.

Article VI alleged that Judge Humphreys had continued to hold court in his state, calling it the district court of the Confederate States of America. Article VI was divided into three specifications, related to Humphreys' acts while sitting as a Confederate judge. The first specification charged that Humphreys endeavored to coerce a Union supporter to swear allegiance to the Confederacy. The second charged that he ordered the confiscation of private property on behalf of the Confederacy. The third charged that he jailed Union sympathizers who resisted the Confederacy.

Article VII charged that while sitting as a Confederate judge, Humphreys unlawfully arrested and imprisoned a Union supporter.

c. Proceedings in the Senate

Humphreys could not be personally served with the impeachment summons because he had fled Union territory.[35] He neither appeared at the trial nor contested the charges.

The Senate convicted Humphreys of all charges except the confiscation of property on behalf of the Confederacy, which several Senators stated had not been properly proved.[36] The vote ranged from 38–0 guilty on Articles I and IV to 11–24 not guilty on specification two of Article VI.

6. PRESIDENT ANDREW JOHNSON (1867–1868)

a. Proceedings in the House

The House adopted a resolution in 1867 authorizing the Judiciary Committee to inquire into the conduct of President Johnson.[37] A majority of the committee recommended impeachment,[38] but the House voted against the resolution, 108 to 57.[39] In 1868, however, the House authorized an inquiry by the Committee on Reconstruction, which reported an impeachment resolution after President Johnson had removed Secretary of War Stanton from office. The House voted to impeach, 128–47.[40]

b. Articles of Impeachment

Nine of the eleven articles drawn by a select committee and adopted by the House related solely to the President's removal of Stanton. The removal allegedly violated the recently enacted Tenure of Office Act,[41] which also categorized it as a "high misdemeanor."[42]

The House voted on each of the first nine articles separately; the tenth and eleventh articles were adopted the following day.

Article I charged that Johnson,

> unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should

[35] *Id.* 2617.
[36] *Id.* 2950.
[37] CONG. GLOBE, 39th Cong., 2d Sess. 320–21 (1867).
[38] H.R. REP. No. 7, 40th Cong., 1st Sess. 59 (1867).
[39] CONG. GLOBE, 40th Cong., 2d Sess. 68 (1867).
[40] CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868).
[41] Act of March 2, 1867, 14 Stat. 430.
[42] *Id.* § 6.

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> take care that the laws be faithfully executed, did unlawfully and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton.

Article I concluded that President Johnson had committed "a high misdemeanor in office."[43]

Articles II and III characterized the President's conduct in the same terms but charged him with the allegedly unlawful appointment of Stanton's replacement.

Article IV charged that Johnson, with intent, unlawfully conspired with the replacement for Stanton and Members of the House of Representatives to "hinder and prevent" Stanton from holding his office.

Article V, a variation of the preceding article, charged a conspiracy to prevent the execution of the Tenure of Office Act, in addition to a conspiracy to prevent Stanton from holding his office.

Article VI charged Johnson with conspiring with Stanton's designated replacement, "by force to seize, take and possess" government property in Stanton's possession, in violation of both an "act to define and punish certain conspiracies" and the Tenure of Office Act.

Article VII charged the same offense, but as a violation of the Tenure of Office Act only.

Article VIII alleged that Johnson, by appointing a new Secretary of War, had, "with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War," violated the provisions of the Tenure of Office Act.

Article IX charged that Johnson, in his role as Commander in Chief, had instructed the General in charge of the military forces in Washington that part of the Tenure of Office Act was unconstitutional, with intent to induce the General, in his official capacity as commander of the Department of Washington, to prevent the execution of the Tenure of Office Act.

Article X, which was adopted by amendment after the first nine articles, alleged that Johnson,

> unmindful of the high duties of his office and the dignity and proprieties thereof, . . . designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach, the Congress of the United States, [and] to impair and destroy the regard and respect of all good people . . . for the Congress and legislative power thereof . . .

by making "certain intemperate, inflammatory, and scandalous harangues." In addition the same speeches were alleged to have brought the high office of the President into "contempt, ridicule, and disgrace, to the great scandal of all good citizens."

Article XI combined the conduct charged in Article X and the nine other articles to allege that Johnson had attempted to prevent the execution of both the Tenure of Office Act and an act relating to army appropriations by unlawfully devising and contriving means by which he could remove Stanton from office.

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[43] For text of articles, see CON. GLOBE, 40th Cong., 2d Sess. 1603–18, 1642 (1868).

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c. Proceedings in the Senate

The Senate voted only on Articles II, III, and XI, and President Johnson was acquitted on each, 35 guilty—19 not guilty, one vote short of the two-thirds required to convict.[44]

d. Miscellaneous

All of the articles relating to the dismissal of Stanton alleged indictable offenses. Article X did not allege an indictable offense, but this article was never voted on by the Senate.

7. DISTRICT JUDGE MARK H. DELAHAY (1873)

a. Proceedings in the House

A resolution authorizing an inquiry by the Judiciary Committee respecting District Judge Delahay was adopted by the House in 1872.[45] In 1873 the committee proposed a resolution of impeachment for "high crimes and misdemeanors in office," which the House [46] adopted.

b. Subsequent Proceedings

Delahay resigned before articles of impeachment were prepared, and the matter was not pursued further by the House. The charge against him had been described in the House as follows:

> The most grevious charge, and that which is beyond all question, was that his personal habits unfitted him for the judicial office, that he was intoxicated off the bench as well as on the bench.[47]

8. SECRETARY OF WAR WILLIAM W. BELKNAP (1876)

a. Proceedings in the House

In 1876 the Committee on Expenditures in the War Department [48] unanimously recommended impeachment of Secretary Belknap "for high crimes and misdemeanors while in office," and the House unanimously adopted the resolution.[49]

b. Articles of Impeachment

Five articles of impeachment were drafted by the Judiciary Committee [50] and adopted by the House, all relating to Belknap's allegedly corrupt appointment of a military post trader. The House agreed to the articles as a group, without voting separately on each.[51]

Article I charged Belknap with "high crimes and misdemeanors in office" for unlawfully receiving sums of money, in consideration for the appointment, made by him as Secretary of War.[52]

Article II charged Belknap with a "high misdemeanor in office" for "willfully, corruptly, and unlawfully" taking and receiving money in return for the continued maintenance of the post trader.[53]

Article III charged that Belknap was "criminally disregarding his duty as Secretary of War, and basely prostituting his high office to

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[44] Cong. Globe Supp., 40th Cong., 2d Sess. 415 (1868).
[45] Cong. Globe, 42d Cong., 2d Sess. 1808 (1872).
[46] Cong. Globe, 42d Cong., 3d Sess. 1909 (1873).
[47] *Id.*
[48] The Committee was authorized to investigate the Department of the Army generally. 12 Cong. Rec. 414 (1876).
[49] 14 Cong. Rec. 1428–38 (1876).
[50] 15 Cong. Rec. 2081–82 (1876).
[51] *Id.* 2109.
[52] *Id.* 2159.
[53] *Id.*

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his lust for private gain," when he "unlawfully and corruptly" continued his appointee in office, "to the great injury and damage of the officers and soldiers of the United States" stationed at the military post. The maintenance of the trader was also alleged to be "against public policy, and to the great disgrace and detriment of the public service." [54]

Article IV alleged seventeen separate specifications relating to Belknap's appointment and continuance in office of the post trader.[55]

Article V enumerated the instances in which Belknap or his wife had corruptly received "divert large sums of money." [56]

c. Proceedings in the Senate

The Senate failed to convict Belknap on any of the articles, with votes on the articles ranging from 35 guilty—25 not guilty to 37 guilty—25 not guilty.[57]

d. Miscellaneous

In the Senate trial, it was argued that because Belknap had resigned prior to his impeachment the case should be dropped. The Senate, by a vote of 37 to 29, decided that Belknap was amenable to trial by impeachment.[58] Twenty-two of the Senator voting not guilty on each article, nevertheless indicated that in their view the Senate had no jurisdiction.[59]

9. DISTRICT JUDGE CHARLES SWAYNE (1903–1905)

a. Proceedings in the House

The House adopted a resolution in 1903 directing an investigation by the Judiciary Committee of District Judge Swayne.[60] The committee held hearings during the next year, and reported a resolution that Swayne be impeached "of high crimes and misdemeanors" in late 1904.[61] The House agreed to the resolution unanimously.

b. Articles of Impeachment

After the vote to impeach, thirteen articles were drafted and approved by the House in 1905.[62] However, only the first twelve articles were presented to the Senate.[63]

Article I charged that Swayne had knowingly filed a false certificate and claim for travel expenses while serving as a visiting judge, "whereby he has been guilty of a high crime and misdemeanor in said office."

Articles II and III charged that Swayne, having claimed and received excess travel reimbursement for other trips, had "misbehaved himself and was and is guilty of a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and of a high misdemeanor in office."

Articles IV and V charged that Swayne, having appropriated a private railroad car that was under the custody of a receiver of his court

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[54] *Id.*
[55] *Id.*
[56] *Id.* 2160.
[57] 19 CONG. REC. 343–57 (1876).
[58] *Id.* 75.
[59] *Id.* 342–57.
[60] 38 CONG. REC. 103 (1903).
[61] 39 CONG. REC. 247–48 (1904).
[62] H.R. REP. No. 3477, 58th Cong., 3d Sess. (1905).
[63] 39 CONG. REC. 1056–58 (1905).

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and used the car, its provisions, and a porter without making compensation to the railroad, "was and is guilty of an abuse of judicial power and of a high misdemeanor in office."

Articles VI and VII charged that for periods of six years and nine years, Judge Swayne had not been a bona fide resident of his judicial district, in violation of a statute requiring every federal judge to reside in his judicial district. The statute provided that "for offending against this provision [the judge] shall be deemed guilty of a high misdemeanor." The articles charged that Swayne "willfully and knowingly violated" this law and "was and is guilty of a high misdemeanor in office."

Articles VIII, IX, X, XI and XII charged that Swayne improperly imprisoned two attorneys and a litigant for contempt of court. Articles VIII and X alleged that the imprisonment of the attorneys was done "maliciously and unlawfully" and Articles IX and XI charged that these imprisonments were done "knowingly and unlawfully." Article XI charged that the private person was imprisoned "unlawfully and knowingly." Each of these five articles concluded by charging that by so acting, Swayne had "misbehaved himself in his office as judge and was and is guilty of an abuse of judicial power and a high misdemeanor in office."

c. Proceedings in the Senate

A majority of the Senate voted acquittal on all articles.[64]

10. CIRCUIT JUDGE ROBERT W. ARCHBALD (1912–1913)

a. Proceedings in the House

The House authorized an investigation by the Judiciary Committee on Circuit Judge Archbald of the Commerce Court in 1912.[65] The Committee unanimously reported a resolution that Archbald be impeached for "misbehavior and for high crimes and misdemeanors," and the House adopted the resolution, 223 to 1.[66]

b. Articles of Impeachment

Thirteen Articles of impeachment were presented and adopted simultaneously with the resolution for impeachment.

Article I charged that Archbald "willfully, unlawfully, and corruptly took advantage of his official position . . . to induce and influence the officials" of a company with litigation pending before his court to enter into a contract with Archbald and his business partner to sell them assets of a subsidiary company. The contract was allegedly profitable to Archbald.[67]

Article II also charged Archbald with "willfully, unlawfully, and corruptly" using his position as judge to influence a litigant then before the Interstate Commerce Commission (who on appeal would be before the Commerce Court) to settle the case and purchase stock.[68]

Article III charged Archbald with using his official position to obtain a leasing agreement from a party with suits pending in the Commerce Court.[69]

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[64] *Id.* 3467–72.
[65] 48 CONG. REC. 5242 (1912).
[66] *Id.* 8933.
[67] *Id.* 8904.
[68] *Id.* 8905.
[69] *Id.*

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Article IV alleged "gross and improper conduct" in that Archbald had (in another suit pending in the Commerce Court) "secretly, wrongfully, and unlawfully" requested an attorney to obtain an explanation of certain testimony from a witness in the case, and subsequently requested argument in support of certain contentions from the same attorney, all "without the knowledge or consent" of the opposing party.[70]

Article V charged Archbald with accepting "a gift, reward or present" from a person for whom Archbald had attempted to gain a favorable leasing agreement with a potential litigant in Archbald's court.[71]

Article VI again charged improper use of Archbald's influence as a judge, this time with respect to a purchase of an interest in land.

Articles VII through XII referred to Archbald's conduct during his tenure as district court judge. These articles alleged improper and unbecoming conduct constituting "misbehavior" and "gross misconduct" in office stemming from the misuse of his position as judge to influence litigants before his court, resulting in personal gain to Archbald. He was also charged with accepting a "large sum of money" from people likely "to be interested in litigation" in his court, and such conduct was alleged to "bring his . . . office of district judge into disrepute."[72] Archbald was also charged with accepting money "contributed . . . by various attorneys who were practitioners in the said court", and appointing and maintaining as jury commissioner an attorney whom he knew to be general counsel for a potential litigant.[73]

Article XIII summarized Archbald's conduct both as district court judge and commerce court judge, charging that Archbald had used these offices "wrongfully to obtain credit," and charging that he had used the latter office to affect "various and diverse contracts and agreements," in return for which he had received hidden interests in said contracts, agreements, and properties.[74]

c. Proceedings in the Senate

The Senate found Archbald guilty of the charges in five of the thirteen articles, including the catch-all thirteenth. Archbald was removed from office and disqualified from holding any future office.[75]

11. DISTRICT JUDGE GEORGE W. ENGLISH (1925–1926)

a. Proceedings in the House

The House adopted a resolution in 1925 directing an inquiry into the official conduct of District Judge English. A subcommittee of the Judiciary Committee took evidence in 1925 and recommended impeachment.[76] In March 1926, the Judiciary Committee reported an impeachment resolution and five articles of impeachment.[77] The House adopted the impeachment resolution and the articles by a vote of 306 to 62.[78]

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[70] *Id.*
[71] *Id.*
[72] *Id.* 8906.
[73] *Id.*
[74] *Id.*
[75] S. Doc. No. 1140, 62d Cong., 3d Sess. 1620–49 (1913).
[76] H.R. Doc. No. 145, 69th Cong., 1st Sess. (1925).
[77] 67 Cong. Rec. 6280 (1926).
[78] *Id.* 6735.

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Judge English resigned six days before the date set for trial in the Senate. The House Managers stated that the resignation in no way affected the right of the Senate to try the charges, but recommended that the impeachment proceedings be discontinued.[79] The recommendation was accepted by the House, 290 to 23.[80]

b. Articles of Impeachment

Article I charged that Judge English "did on divers and various occasions so abuse the powers of his high office that he is hereby charged with tyranny and oppression, whereby he has brought the administration of justice in [his] court . . . into disrepute, and . . . is guilty of misbehavior falling under the constitutional provision as ground for impeachment and removal from office." The article alleged that the judge had "willfully, tyrannically, oppressively and unlawfully" disbarred lawyers practicing before him, summoned state and local officials to his court in an imaginary case and denounced them with profane language, and without sufficient cause summoned two newspapermen to his court and threatened them with imprisonment. It was also alleged that Judge English stated in open court that if he instructed a jury that a man was guilty and they did not find him guilty, he would send the jurors to jail.

Article II charged that Judge English knowingly entered into an "unlawful and improper combination" with a referee in bankruptcy, appointed by him, to control bankruptcy proceedings in his district for the benefit and profit of the judge and his relatives and friends, and amended the bankruptcy rules of his court to enlarge the authority of the bankruptcy receiver, with a view to his own benefit.

Article III charged that Judge English "corruptly extended favoritism in diverse matters," "with the intent to corruptly prefer" the referee in bankruptcy, to whom English was alleged to be "under great obligations, financial and otherwise."

Article IV charged that Judge English ordered bankruptcy funds within the jurisdiction of his court to be deposited in banks of which he was a stockholder, director and depositor, and that the judge entered into an agreement with each bank to designate the bank a depository of interest-free bankruptcy funds if the bank would employ the judge's son as a cashier. These actions were stated to have been taken "with the wrongful and unlawful intent to use the influence of his . . . office as judge for the personal profit of himself" and his family and friends.

Article V alleged that Judge English's treatment of members of the bar and conduct in his court during his tenure had been oppressive to both members of the bar and their clients and had deprived the clients of their rights to be protected in liberty and property. It also alleged that Judge English "at diverse times and places, while acting as such judge, did disregard the authority of the laws, and . . . did refuse to allow . . . the benefit of trial by jury, contrary to his . . . trust and duty as judge of said district court, against the laws of the United States and in violation of the solemn oath which he had taken to administer equal and impartial justice." Judge English's conduct in making decisions and orders was alleged to be such "as to excite fear and distrust and to inspire a widespread belief, in and beyond his judicial district

[79] 68 CONG. REC. 297 (1926).
[80] *Id.* 302.

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. . . that causes were not decided in said court according to their merits," "[a]ll to the scandal and disrepute" of his court and the administration of justice in it. This "course of conduct" was alleged to be "misbehavior" and "a misdemeanor in office."

c. Proceedings in the Senate

The Senate, being informed by the Managers for the House that the House desired to discontinue the proceedings in view of the resignation of Judge English, approved a resolution dismissing the proceedings by a vote of 70 to 9.[81]

12. DISTRICT JUDGE HAROLD LOUDERBACK (1932–1933)

a. Proceedings in the House

A resolution directing an inquiry into the official conduct of District Judge Louderback was adopted by the House in 1932. A subcommittee of the Judiciary Committee took evidence. The full Judiciary Committee submitted a report in 1933, including a resolution that the evidence did not warrant impeachment, and a brief censure of the Judge for conduct prejudicial to the dignity of the judiciary.[82] A minority consisting of five Members recommended impeachment and moved five articles of impeachment from the floor of the House.[83] The five articles were adopted as a group by a vote of 183 to 143.[84]

b. Articles of Impeachment

Article I charged that Louderback "did . . . so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in the court of which he is a judge into disrepute, and by his conduct is guilty of misbehavior." It alleged that Louderback used "his office and power of district judge in his own personal interest" by causing an attorney to be appointed as a receiver in bankruptcy at the demand of a person to whom Louderback was under financial obligation. It was further alleged that the attorney had received "large and exorbitant fees" for his services; and that these fees had been passed on to the person whom Louderback was to reimburse for bills incurred on Louderback's behalf.

Article II charged that Louderback had allowed excessive fees to a receiver and an attorney, described as his "personal and political friends and associates," and had unlawfully made an order conditional upon the agreement of the parties not to appeal from the allowance of fees. This was described as "a course of improper and unlawful conduct as a Judge." It was further alleged that Louderback "did not give his fair, impartial, and judicial consideration" to certain objections; and that he "was and is guilty of a course of conduct oppressive and unjudicial."

Article III charged the knowing appointment of an unqualified person as a receiver, resulting in disadvantage to litigants in his court.

Article IV charged that "misusing the powers of his judical office for the sole purpose of enriching" the unqualified receiver mentioned in Article III, Louderback failed to give "fair, impartial, and judicial

[81] *Id.* 344, 348.
[82] 76 CONG. REC. 4913 (1933); H.R. REP. No. 2065, 72d Cong., 2d Sess. 1 (1933).
[83] 76 CONG. REC. 4914 (1933); H.R. REP. No. 2065, 72d Cong., 2d Sess. 13 (1933).
[84] 76 CONG. REC. 4925 (1933).

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consideration" to an application to discharge the receiver; that "sitting in a part of the court to which he had not been assigned at the time," he took jurisdiction of a case although knowing that the facts and law compelled dismissal; and that this conduct was "filled with partiality and favoritism" and constituted "misbehavior" and a "misdemeanor in office."

Article V, as amended, charged that "the reasonable and probable result" of Louderback's actions alleged in the previous articles "has been to create a general condition of widespread fear and distrust and disbelief in the fairness and disinterestedness" of his official actions. It further alleged that the "general and aggregate result" of the conduct had been to destroy confidence in Louderback's court, "which for a Federal judge to destroy is a crime and misdemeanor of the highest order." [85]

c. Proceedings in the Senate

A motion by counsel for Judge Louderback to make the original Article V more definite was consented to by the Managers for the House, resulting in the amendment of that Article.[86]

Some Senators who had not heard all the testimony felt unqualified to vote upon Articles I through IV, but capable of voting on Article V, the omnibus or "catchall" article.[87]

Judge Louderback was acquitted on each of the first four articles, the closest vote being on Article I (34 guilty, 42 not guilty). He was then acquitted on Article V, the vote being 45 guilty, 34 not guilty—short of the two-thirds majority required for conviction.

13. DISTRICT JUDGE HALSTED L. RITTER (1933–1936)

a. Proceedings in the House

A resolution directing an inquiry into the official conduct of District Judge Ritter was adopted by the House in 1933.[88] A subcommittee of the Judiciary Committee took evidence in 1933 and 1934. A resolution that Ritter "be impeached for misbehavior, and for high crimes and misdemeanors," and recommending the adoption of four articles of impeachment, was reported to the full House in 1936, and adopted by a vote of 181 to 146.[89] Before trial in the Senate, the House approved a resolution submitted by the House Managers, replacing the fourth original articles with seven amended ones, some charging new offenses.[90]

b. Articles of Impeachment

Article I charged Ritter with "misbehavior" and "a high crime and misdemeanor in office," in fixing an exorbitant attorney's fee to be paid to Ritter's former law partner, in disregard of the "restraint of propriety . . . and . . . danger of embarrassment"; and in "corruptly and unlawfully" accepting cash payments from the attorney at the time the fee was paid.

Article II charged that Ritter, with others, entered into an "arrangement" whose purpose was to ensure that bankruptcy property

[85] 77 CONG. REC. 1857, 4086 (1933).
[86] *Id.* 1852, 1857.
[87] *Id.* 4082.
[88] *Id.* 4575.
[89] 80 CONG. REC. 3066–3092 (1936).
[90] *Id.* 4597–4601.

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would continue in litigation before Ritter's court. Rulings by Ritter were alleged to have "made effective the champertous undertaking" of others, but Ritter was not himself explicitly charged with the crime of champerty or related criminal offenses. Article II also repeated the allegations of corrupt and unlawful receipt of funds and alleged that Judge Ritter "profited personally" from the "excessive and unwarranted" fees, that he had received a free room at a hotel in receivership in his court, and that he "wilfully failed and neglected to perform his duty to conserve the assets" of the hotel.

Article III, as amended, charged Ritter with the practice of law while on the bench, in violation of the Judicial Code. Ritter was alleged to have solicited and received money from a corporate client of his old law firm. The client allegedly had large property interests within the territorial jurisdiction of Ritter's court. These acts were described as "calculated to bring his office into disrepute," and as a "high crime and misdemeanor."

Article IV, added by the Managers of the House, also charged practice of law while on the bench, in violation of the Judicial Code.

Articles V and VI, also added by the Managers, alleged that Ritter had violated the Revenue Act of 1928 by willfully failing to report and pay tax on certain income received by him—primarily the sums described in Articles I through IV. Each failure was described as a "high misdemeanor in office."

Article VII (*former Article IV amended*) charged that Ritter was guilty of misbehavior and high crimes and misdemeanors in office because "the reasonable and probable consequence of [his] actions or conduct . . . as an individual or . . . judge, is to bring his court into scandal and disrepute," to the prejudice of his court and public confidence in the administration of justice in it, and to "the prejudice of public respect for and confidence in the Federal judiciary," rendering him "unfit to continue to serve as such judge." There followed four specifications of the "actions or conduct" referred to. The first two were later dropped by the Managers at the outset of the Senate trial; the third referred to Ritter's acceptance (not alleged to be corrupt or unlawful) of fees and gratuities from persons with large property interests within his territorial jurisdiction. The fourth, or omnibus, specification was to "his conduct as detailed in Articles I, II, III and IV hereof, and by his income-tax evasions as set forth in Articles V and VI hereof."

Before the amendment of Article VII by the Managers, the omnibus clause had referred only to Articles I and II, and not to the criminal allegations about practice of law and income tax evasion.

c. Proceedings in the Senate

Judge Ritter was acquitted on each of the first six articles, the guilty vote on Article I falling one vote short of the two-thirds needed to convict. He was then convicted on Article VII—the two specifications of that Article not being separately voted upon—by a single vote, 56 to 28.[91] A point of order was raised that the conviction under Article VII was improper because on the acquittals on the substantive charges of Articles I through VI. The point of order was overruled by the Chair, the Chair stating, "A point of order is made as to Article VII

[91] S. Doc. No. 200, 74th Cong., 2d Sess. 637-38 (1936).

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in which the respondent is charged with general misbehavior. It is a separate charge from any other charge." [92]

d. Miscellaneous

After conviction, Judge Ritter collaterally attacked the validity of the Senate proceedings by bringing in the Court of Claims an action to recover his salary. The Court of Claims dismissed the suit on the ground that no judicial court of the United States has authority to review the action of the Senate in an impeachment trial.[93]

[92] *Id.* 638.
[93] Ritter v. United States, 84 Ct. Cl. 293, 300, *cert denied*, 300 U.S. 668 (1936).

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APPENDIX C

Secondary Sources on the Criminality Issue

The Association of the Bar of the City of New York. *The Law of Presidential Impeachment and Removal* (1974). The study concludes that impeachment is not limited to criminal offenses but extends to conduct undermining governmental integrity.

Bayard, James. *A Brief Exposition of the Constitution of the United States*, (Hogan & Thompson, Philadelphia, (1833). A treatise on American constitutional law concluding that ordinary legal forms ought not to govern the impeachment process.

Berger, Raoul. *Impeachment: The Constitutional Problems*, (Harvard University Press, Cambridge, 1973). A critical historical survey of English and American precedents concluding that criminality is not a requirement for impeachment.

Bestor, Arthur, "Book Review, Berger, *Impeachment: The Constitutional Problems*," 19 *Wash. L. Rev.* 225 (1973). A review concluding that the thrust of impeachment in English history and as viewed by the framers was to reach political conduct injurious to the commonwealth, whether or not the conduct was criminal.

Boutwell, George, *The Constitution of the United States at the End of the First Century*, (D. C. Heath & Co., Boston, 1895). A discussion of the Constitution's meaning after a century's use, concluding that impeachment had not been confined to criminal offenses.

Brant, Irving. *Impeachment: Trials & Errors*, (Alfred Knopf, New York, 1972). A descriptive history of American impeachment proceedings, which concludes that the Constitution should be read to limit impeachment to criminal offenses, including the common law offense of misconduct in office and including violations of oaths of office.

Bryce, James. *The American Commonwealth*, (Macmillan Co., New York, 1931) (reprint). An exposition on American government concluding that there was no final decision as to whether impeachment was confined to indictable crimes. The author notes that in English impeachments there was no requirement for an indictable crime.

Burdick, Charles, *The Law of the American Constitution*, (G. T. Putnam & Sons, New York, 1922). A text on constitutional interpretation concluding that misconduct in office by itself is grounds for impeachment.

Dwight, Theodore, "Trial by Impeachment," 6 *Am. L. Reg.* (*N.S.*) 257 (1867). An article on the eve of President Andrew Johnson's impeachment concluding that an indictable crime was necessary to make out an impeachable offense.

Ettridge, George, "The Law of Impeachment," 8 *Miss. L. J.* 283 (1936). An article arguing that impeachable offenses had a definite meaning discoverable in history, statute and common law.

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Feerick, John, "Impeaching Federal Judges: A Study of the Constitutional Provisions," 39 *Fordham L. Rev.* 1 (1970). An article concluding that impeachment was not limited to indictable crimes but extended to serious misconduct in office.

Fenton, Paul, "The Scope of the Impeachment Power," 65 *Nw. U. L. Rev.* 719 (1970). A law review article concluding that impeachable offenses are not limited to crimes, indictable or otherwise.

Finley, John and John Sanderson, *The American Executive and Executive Methods*, (Century Co., New York, 1908). A book on the presidency concluding that impeachment reaches misconduct in office, which was a common law crime embracing all improprieties showing unfitness to hold office.

Foster, Roger, *Commentaries on the Constitution of the United States*, (Boston Book Co., Boston, 1896), vol. I. A discussion of constitutional law concluding that in light of English and American history any conduct showing unfitness for office is an impeachable offense.

Lawrence, William, "A Brief of the Authorities upon the Law of Impeachable Crimes and Misdemeanors," *Congressional Globe Supplement*, 40th Congress, 2d Session, at 41 (1868). An article at the time of Andrew Johnson's impeachment concluding that indictable crimes were not needed to make out an impeachable offense.

Note, "The Exclusiveness of the Impeachment Power under the Constitution," 51 *Harv. L. Rev.* 330 (1937). An article concluding that the Constitution included more than indictable crimes in its definition of impeachable offenses.

Note, "Vagueness in the Constitution: The Impeachment Power," 25 *Stan. L. Rev.* 908 (1973). This book review of the Berger and Brant books concludes that neither author satisfactorily answers the question whether impeachable offenses are limited to indictable crimes.

Pomeroy, John, *An Introduction to the Constitutional Law of the United States*, (Hurd and Houghton, New York 1870). A consideration of constitutional history which concludes that impeachment reached more than ordinary indictable offenses.

Rawle, William, *A View of the Constitution of the United States*, (P. H. Nicklin, Philadelphia, 1829, 2 vol. ed.). A discussion of the legal and political principles underlying the Constitution, concluding on this issue that an impeachable offense need not be a statutory crime, but that reference should be made to non-statutory law.

Rottschaefer, Henry, *Handbook of American Constitutional Law*, (West, St. Paul, 1939). A treatise on the Constitution concluding that impeachment reached any conduct showing unfitness for office, whether or not a criminal offense.

Schwartz, Bernard, *A Commentary on the Constitution of the United States*, vol. I, (Macmillan, New York, 1963). A treatise on various aspects of the Constitution which concludes that there was no settled definition of the phrase "high Crimes and Misdemeanors," but that it did not extend to acts merely unpopular with Congress. The author suggests that criminal offenses may not be the whole content of the Constitution on this point, but that such offenses should be a guide.

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Sheppard, Furman, *The Constitutional Textbook*, (George W. Childs, Philadelphia, 1855). A text on Constitutional meaning concluding that impeachment was designed to reach any serious violation of public trust, whether or not a strictly legal offense.

Simpson, Alex., *A Treatise on Federal Impeachments*, (Philadelphia Bar Association, Phila., 1916) (reproduced in substantial part in 64 *U.Pa.L.Rev.* 651 (1916)). After reviewing English and American impeachments and available commentary, the author concludes that an indictable crime is not necessary to impeach.

Story, Joseph, *Commentaries on the Constitution of the United States*, vol. 1, 5th edition, (Little, Brown & Co., Boston 1891). A commentary by an early Supreme Court Justice who concludes that impeachment reached conduct not indictable under the criminal law.

Thomas, David, "The Law of Impeachment in the United States." 2 *Am. Pol. Sci. Rev.* 378 (1908). A political scientist's view on impeachment concluding that the phrase "high Crimes and Misdemeanors" was meant to include more than indictable crimes. The author argues that English parliamentary history, American precedent, and common law support his conclusion.

Tucker, John, *The Constitution of the United States*, (Callaghan & Co., Chicago, 1899), vol. 1. A treatise on the Constitution concluding that impeachable offenses embrace willful violations of public duty whether or not a breach of positive law.

Wasson, Richard, *The Constitution of the United States: Its History and Meaning* (Bobbs-Merrill, Indianapolis, 1927). A short discussion of the Constitution concluding that criminal offenses do not exhaust the reach of the impeachment power of Congress. Any gross misconduct in office was thought an impeachable offense by this author.

Watson, David, *The Constitution of the United States*, (Callaghan & Co., Chicago, 1910), volumes I and II. A treatise on Constitutional interpretation concluding that impeachment reaches misconduct in office whether or not criminal.

Wharton, Francis, *Commentaries on Law*, (Kay & Bro., Philadelphia, 1884). A treatise by an author familiar with both criminal and Constitutional law. He concludes that impeachment reached willful misconduct in office that was normally indictable at common law.

Willoughby, Westel, *The Constitutional Law of the United States*, vol. III, 2nd edition, (Baker, Voorhis & Co., New York, 1929). The author concludes that impeachment was not limited to offenses made criminal by federal statute.

Yankwich, Leon, "Impeachment of Civil Officers under the Federal Constitution," 26 *Geo. L. Rev.* 849 (1938). A law review article concluding that impeachment covers general official misconduct whether or not a violation of law.

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